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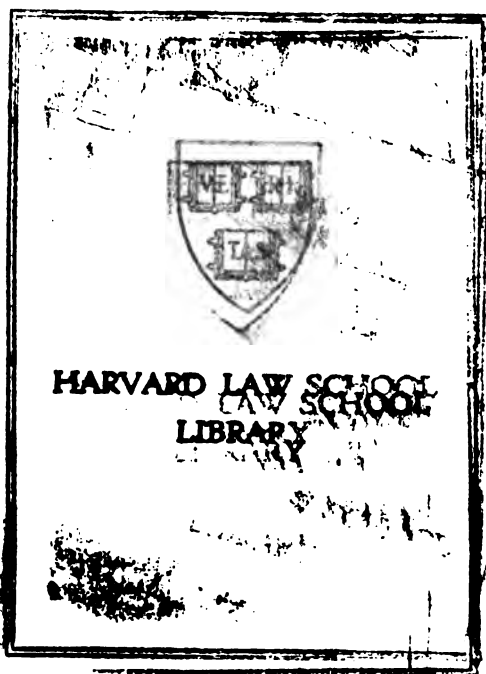
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REPORTS

OF

THE DECISIONS

OF THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS.

BY

JAMES B. BRADWELL.

VOLUME III.

CONTAINING A PORTION OF THE OPINIONS OF THE FIRST DISTRICT OF THE MARCH TERM, 1879; ALL THE REMAINING OPINIONS OF THE SECOND DISTRICT, UP TO THE JUNE TERM, 1879; ALL THE REMAINING OPINIONS OF THE THIRD DISTRICT, UP TO THE MAY TERM, 1879; AND ALL THE OPINIONS OF THE FOURTH DISTRICT, FROM THE ORGANIZATION OF THE COURT UP TO THE JULY TERM, 1879.

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OFFICERS OF THE APPELLATE COURTS OF ILLINOIS

FROM THEIR ORGANIZATION.

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THEODORE D. MURPHY,† <i>Presiding Judge</i> ,	Woodstock.
GEORGE W. PLEASANTS,‡ <i>Judge</i> ,	Rock Island.
JOSEPH M. BAILEY, <i>Presiding Judge</i> ,	Freeport.
ISAAC G. WILSON, <i>Judge</i> ,	Geneva.
W. K. McALLISTER, <i>Judge</i> ,	Chicago.
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LYMAN LACEY,‡ <i>Judge</i> ,	Havana.
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JAMES C. ALLEN,† <i>Judge</i> ,	Olney.
GEORGE W. WALL, <i>Judge</i> ,	DuQuoin.
THOMAS S. CASEY, <i>Judge</i> ,	Mt. Vernon.
R. A. D. WILBANKS, <i>Former Clerk</i> ,	Mt. Vernon.
J. Q. HARMAN, <i>Present Clerk</i> ,	Mt. Vernon.

* Deceased.

† Term expired June 2, 1879.

‡ Transferred to Second District, June, 1879.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1878.

THE PEOPLE OF THE STATE OF ILLINOIS, use, etc.

v.

WILLIAM PRICE ET AL.

1. JUSTICE OF THE PEACE—FAILURE TO PAY MONEY COLLECTED.—It is the duty of a justice of the peace to pay over all moneys that may come to his hands under any judgment or otherwise by virtue of his office, subsequently to the commencement of his term of office, regardless of the time when the claims were received by him for collection.

2. EXPIRATION OF TERM—SUCCESSOR.—When one justice retires and another succeeds to his office, the docket, and all papers pertaining to his office should be turned over to the latter, who should proceed to the completion of all unfinished business. The rule is the same whether the incumbent succeeds himself or another, and if the claims were received by the justice during his first term of office, they passed to himself as his own successor when he qualified for the second term.

3. BURDEN OF PROOF.—It was erroneous to instruct the jury, that because the justice was a public officer, the law would presume that he would do his duty and pay over the money collected, and that such presumption must be overcome by a preponderance of evidence. If the money was proved to have been collected by the justice, it would make a *prima facie* case in favor of the plaintiffs and shift the burden of proof upon appellees to show that the money had been paid over.

4. ESTOPPEL.—The judgments rendered by the justice, and afterwards collected by him, were collected by virtue of his office, and the justice and the sureties on his official bond are estopped to deny that fact.

5. EVIDENCE—COMPETENCY.—The judgment docket of the justice, showing the two judgments in favor of appellants, and the testimony of the

The People v. Price et al.

constable tending to show that he paid them to the justice, were competent evidence, and the court erred in refusing to admit them.

APPEAL from the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

Mr. J. K. ESSICK, for appellants.

Messrs. SWEET & DAY, for appellees.

LACEY, J. This cause was tried at the September term of the Circuit Court of Champaign county, and resulted in a verdict and judgment for appellees.

The cause of action was the official bond of I. H. Hess, police magistrate of Champaign city, signed by appellees as his security. It was in the penal sum of \$2,000, dated April 19, 1872, with the usual recitals, and with the following condition: "If the said I. H. Hess shall justly account for and pay over all moneys that may come to his hands under any judgment or otherwise by virtue of his said office, etc. . . . then this obligation to be void, otherwise to remain in full force."

In the fall or summer of 1875, Hess died; he was his own successor in office, having held a term prior to this one. The breaches assigned in the bond were the alleged defalcations of Hess in not paying over moneys collected by him, belonging to appellants, during his last term of office; part collected on judgments rendered by him and part without. All as was declared collected by virtue of his office, and during his last term.

The defense set up was that the claims were not collected by Hess by virtue of his office, but as the private agent of appellants. There was some uncertainty or want of evidence as to the time Hess received the claims, or at least a portion of them, for collection, whether during his first or last term of office. The court on the trial, at the request of appellees, gave the following instructions:

1. "The court instructs the jury that the defendants are not liable for any claims received by Hess, as justice of the peace for collection prior to the 19th day of April, 1872."

4. "The court instructs the jury that the burden of proof is upon the plaintiffs to show by evidence that the claims here sued on were placed in the hands of Hess after the 19th day of April, 1872, and if the evidence fails to show when the claims were placed in the hands of Hess for collection, then in such case plaintiffs would not make out their case."

The assignment of errors on the giving of these instructions for appellees against appellants' objections we think well taken. It was wholly immaterial as to when and in what way the claims were received by Hess. By the terms of his bond he was to pay over all moneys that might come to his hands under any judgment or otherwise by virtue of his office," not that he should pay over such moneys only as should be received on judgments or otherwise coming to his hands, subsequently to the commencement of his term of office. All moneys received by virtue of his office were to be paid over regardless of the time when the claims were received.

The evidence shows that all collections made by Hess were made subsequent to April 19, 1872, and the judgments rendered were subsequent to that time.

When one justice retires and another succeeds to his office, the statute requires that the "docket, statutes and all papers relating to the business transactions before him, shall be turned over to the latter, who shall issue execution and proceed to the completion of all unfinished business. The functions of the outgoing justice entirely cease and those of the new one commence." Stat. 1874, 653, §§ 108-109. All moneys shall be paid over by the justice taking upon himself the duties of his office, "collected on any judgment or otherwise by virtue of his office." Stat. 1874, 638, § 5.

The rule is the same whether the incumbent succeeds himself or another. The old justice does no act and is responsible for nothing done by the new justice after the succession.

If these claims were received by Hess during his first term of office as justice, they passed to himself as his own successor when he qualified for the second term. The only issue is, did any money come to his hands by virtue of his office? Green

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et al. v. Wardell, 17 Ill. 280; Morley v. Town of Metamora, 78 Ill. 394.

Then again, the court below gave the jury, at the request of appellee and against the objection of appellants, instructions Nos. 8 and 10, which is claimed to be error. The instructions are in substance that appellants could not make out a case against appellees by proving that I. H. Hess collected money belonging to Farrar and Wheeler, but that they must show by a preponderance of evidence that I. H. Hess did not pay over the money to them.

That the law would presume that Hess, because an officer, would do his duty, and that he paid over the money collected, and that the burthen of proof was on appellants to overcome such presumption. The instructions were erroneous. The law does not in this kind of a case compel the plaintiff to prove a negative. If the money were proved to have been collected by the justice of the peace it would make a *prima facie* case in favor of the appellants and shift the burthen of proof on the appellees, to show that the money had been paid over. Grove v. Brown, 11 Ill. 431; Johnson v. Maples et al. 49 Ill. 101; Howard v. Slagle, 52 Ill. 336.

One other question—we must hold, that the judgments rendered by Hess, and afterward collected by him, were collected by virtue of his office, and that both Hess and his securities, the appellees, are estopped in law from denying that fact.

As to whether the other claims collected by Hess and not paid over, were collected by virtue of his office, or as the private agent of appellants, we express no opinion, for the reason that the question may be passed upon by another jury.

The court below also erred in not admitting in evidence the judgment docket of Hess showing the two judgments in favor of appellants, the one against McNabb and Diviny and the other against Price.

This evidence and the evidence of constable Weller, tending to show that he paid them to Hess, should have been admitted to the jury, leaving them to pass upon the sufficiency of the proof. For these reasons the cause is reversed and remanded.

Reversed and remanded.

Murphy v. McDonald.

PATRICK MURPHY

v.

J. H. McDONALD.

TRIAL OF RIGHT OF PROPERTY—APPEAL MUST BE PRAYED FOR WHEN JUDGMENT RENDERED.—In cases of trial of right of property, the statute requires that an appeal should be prayed for on the day of entering judgment in the cause. So, where the record showed that such appeal was not prayed for until three days after rendering judgment, it was error for the county court to overrule a motion to dismiss the appeal,

APPEAL from the County Court of Morgan county; the Hon. E. P. KIRBY, Judge, presiding.

Mr. G. W. SMITH, for appellant; that the appeal should be prayed on the day of entering the judgment, cited *Pearce v. Swan*, 1 Scam. 266; Rev. Stat. 1874, 652, § 102.

Mr. GEORGE J. DOD, for appellee; as to the manner in which appellant took possession of the property in controversy, and that the sale to him was fraudulent *per se*, cited *Ticknor v. McClelland*, 84 Ill. 471; *Lewis v. Swift*, 54 Ill. 436.

PER CURIAM. This was a case of the trial of the right of property in which appellant was plaintiff and appellee defendant, had before D. C. Oallon, a justice of the peace of Morgan county. Final judgment in favor of appellant was rendered, and the docket was signed by the justice on the 28th day of August, A. D. 1878.

The justice afterwards made the following entry on the justice docket: "The defendant, J. H. McDonald, made demand for an appeal to the County Court, and a bond filed August 31st, 1878, and transcript made up."

The appellant in the County Court moved to dismiss appeal for the reason that the record did not show that an appeal was prayed on the day of entering the judgment in said cause before the justice. This motion the County Court denied, and the appellant excepted to the ruling of the court.

Hutchinson et al. v. Crain et al.

Judgment having been rendered against appellant for costs, he appeals to this court, and assigns for error, among other matters, that the County Court erred in refusing to dismiss appeal. We think the error is well assigned; the statute requires that the appeal shall be prayed for on the day of entering judgment. Statute 1874, 652, § 102.

In this case the record shows that the appeal was not prayed for till August 31st, while the judgment was rendered August 28th. For this error of the County Court, the judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN H. HUTCHINSON ET AL.

V.

JOHN A. CRAIN ET AL.

INSTRUCTIONS—MISRECITING TESTIMONY—UNDUE PROMINENCE TO PARTS OF THE TESTIMONY.—An instruction which misrecites portions of the testimony, and which calls the attention of the jury to particular portions of the evidence, by italicizing the same, is erroneous. Such an instruction is well calculated to influence the jury to the prejudice of the opposite party, and for that reason should not have been given.

ERROR to the County Court of Morgan county; the Hon. E. P. KIRBY, Judge, presiding.

Mr. OSCAR A. DE LEUW, for plaintiffs in error; contending that one member of a firm cannot bind the firm by acts or for purposes not within the scope of the firm business, cited *McNair v. Platt*, 46 Ill. 211; *Brewster v. Mott*, 4 Scam. 378; *Richardson v. French*, 4 Met. 577; *Baron v. Young*, 7 Miss. 1; *Ulery v. Ginrich*, 57 Ill. 531; *Hedly v. Bainbridge*, 3 Ad. & E. 316; *Cooke v. Branch Bank*, 3 Ala. 175.

To bind the firm on a note not given in the course of the firm business, such note must be in the hands of an innocent holder without notice: *Whaley v. Moody*, 2 Humph. 495;

Emerson v. Harmos, 2 Shep. 271; Bank v. Gilliland, 23 Wend. 311; Austin v. Vandermark, 4 Hill, 259.

The burden of proof to show the concurrence of the other partners in the unauthorized acts of one of the firm, is upon the holder of such note: Leverson v. Lane, 13 C. & B. 278; Parsons on Contracts, 162; Metcalf on Contracts, 118; Darling v. March, 22 Me. 188.

Mere knowledge of the partners is no proof of assent: Elliott v. Dudley, 19 Barb. 326; Mercein v. Andrews, 10 Wend. 463.

The court should have allowed evidence to show that Kehoe was solvent and Barrett insolvent at the time of signing the note: Bank v. Bowen, 7 Wend. 158; Joyce v. Williams, 14 Wend. 141; Wilson v. Williams, 14 Wend. 146; 3 Binn. 520.

Admissions by other parties of liability should be explicit, and not by way of inference: Elliott v. Dudley, 19 Barb. 326; Sweetsen v. French, 2 Cush. 309; Shireff v. Wilks, 1 East. 48; Wells v. Westerman, 2 Esp. 731; Edwards on Bills, 103; 14 Wend. 577.

Messrs. MORRISON, WHITLOCK & LIPPINCOTT, for defendants in error; that the assent of the partners is an adoption of the note, though in the hands of a party who took it with notice, cited Edwards on Bills, 106; Com. Bank. v. Warren, 15 N. Y. 133.

Such assent may be implied from facts and circumstances: Gansevoort v. Williams, 14 Wend. 133.

Subsequent recognition of an unauthorized act, is equivalent to previous authority: Byles on Bills, 36.

If the other partners on being informed of the unauthorized act of one of their firms do not dissent or give notice to the payee, they will be bound: Foster v. Andrews, 2 Pa. 160.

It is the province of the jury to reconcile conflicting evidence, and their verdict should not be disturbed: City of Chicago v. Torgerson, 60 Ill. 200; City of Galesburg v. Higley, 61 Ill. 287; Fitch v. Zimmer, 62 Ill. 126; Robinson v. Parish, 62 Ill. 130; Stenger v. Swartwout, 62 Ill. 257; Peru Beer Co. v. First Nat. Bank, 62 Ill. 265; Cass v. Campbell, 63 Ill. 259; Chapman v. Stewart, 63 Ill. 332; C. A. & St. L. R. R. Co. v. Stover, 63 Ill. 358;

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Vogt v. Buschman, 63 Ill. 251; Tucker v. Watte, 64 Ill. 416; McNellis v. Pulsifer, 64 Ill. 494; McLain v. Farden, 83 Ill. 15; Corwith v. Coulter, 82 Ill. 585; Pafineau v. Belgarde, 81 Ill. 61.

HIGBEE, P. J. This was an action of assumpsit brought by defendants in error against plaintiffs in error in the County Court of Morgan county on the following promissory note:

"886.25.

WAVERLY, ILL., January 1st, 1878.

"One day after date we or either of us promise to pay Crain & Manson or order eight hundred and eighty-six dollars and twenty-five cents, for value received, to bear ten per cent. interest from date until paid. If the interest is not annually paid, to become as principal and bear same rate of interest.

"Negotiable and payable without defalcation or discount.

"[SIGNED.]

J. E. BARRETT,

"HUTCHINSON BROS. & Co."

To the declaration defendants, John M. Hutchinson and Jesse S. Allen, filed a plea of non-assumpsit sworn to.

A judgment was rendered against all the defendants below, from which they prosecute a writ of error to this court, and errors are assigned upon the instructions given and refused, and in overruling a motion for a new trial.

It is conceded that the firm of Hutchinson Bros. & Co. were securities on this note only, and that no part of the consideration of the same was received by them. It further appears by the evidence in the case, that the firm name to the note was signed by Daniel B. Hutchinson, in the absence of Allen, who testifies that he had no knowledge of the note until sometime after it was given, and that he never authorized the firm name to be signed to it.

Plaintiffs below sought to show by declarations and conversations of Allen, made after the execution of the note, that he had assented to its execution or ratified it afterwards. The evidence upon this subject was rather vague and unsatisfactory, and was contradicted by Allen. At the instance of defendants in error the court gave, among others, the following instruction:

3d. "That upon the question of the ratification of the signature of the firm name of Hutchinson, Bro. & Cos. to the note in suit in this case, the jury are instructed that they should consider all the facts and circumstances appearing in the evidence in this case, and if they find from the evidence that after the signature of said firm name to said note, that the defendant Allen admitted his liability thereon, and said in substance to the witnesses that he would have to pay said note, and that 'it would break him up,' and made attempts to get Barrett to indemnify him for being such security, then these facts, if proven, should be considered by the jury in determining the question of such ratification. And if the jury, from all the evidence in the case, believe that said Allen, after the signature of said firm name to said note, with a knowledge of the facts in the case, did ratify the same, their verdict should be for the plaintiffs as to said Allen."

This instruction should not have been given, for two reasons. In the first place it misrecites the evidence; Crain does not say that Allen said "*he would have the note to pay.*" His statement in his evidence is that Allen said "he'd be broke up *if* he had it to pay."

Barrett says in his examination in chief: "Allen was security for me on some other paper * * * In February, I proposed to Allen to go to Missouri and buy a mill, and he got mad and said, by about the time he'd paid off these notes he'd be ruined. * * * I understood him to mean this note sued on as well as the others on which he was security. On his cross-examination he says in reference to the same conversation. I said to Allen, suppose you sell out here, and lets go to Missouri in the milling business. He just remarked that I had him in such a fix that he had nothing to sell out; that John M. and David Hutchinson had nothing to pay with, and he would have to pay it. Following this he says that Allen said, *if* he had the Moffit note and also this one to pay, it would take all he had.

Take all these statements together, and they do not justify the recital in the instruction, made still more emphatic by italicizing the same. Again, when the evidence is slight or

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is highly contradictory, it is unfair to select isolated portions of the evidence and give them prominence by calling the attention of the jury especially to them. *Frame v. Badger*, 79 Ill. 441.

The jury may well infer, from such prominence given to particular portions of the evidence, that they strike the mind of the Court as controlling features in the case. If any portion of the evidence bearing upon a particular point in issue is thus made prominent, it would seem but fair that all the evidence touching the same matter on both sides should be stated. Such a course would be less likely to work injury to either party. The practice of reciting the evidence in instructions does not seem to meet with the favor of the Supreme Court of this State. In the case of *Frame v. Badger*, *supra*, it is said: The Court should always instruct that if the facts averred in the issue are proven, reciting them, then they should find for the party in whose favor they shall find the facts; or, if either party holding an affirmation fail to prove the affirmative facts, the jury may be told that if they so find they should find against him.

We think in this case the giving the instruction complained of was well calculated to influence the jury to the prejudice of plaintiff in error, Allen, and for that reason, that the judgment should be reversed and the cause remanded.

Reversed and remanded.

THOMAS E. RICHARDS ET AL.

v.

THOMAS J. RAPE, use, etc.

1. REPLEVIN—REMEDY ON BOND—RETURN OF PROPERTY.—Where a replevin bond was executed to a constable holding the property by virtue of a writ of attachment, and upon the failure of the plaintiff in replevin to prove his right to the property, it was returned to another constable holding an execution against the property issued under the attachment suit, which had in the meantime ripened into a judgment; *held* that the property was properly

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returned, and there was no breach of the bond. The bond was for the benefit of the plaintiff in attachment, and the property was returned to the only party authorized at the time to take it and apply it to the payment of the judgment.

2. **SUBSEQUENT SURRENDER BY THE CONSTABLE.**—A subsequent surrender of the property by the constable under a claim of exemption does not affect the rights of the surety on the replevin bond. His obligation was satisfied when the property was returned, and he cannot be held responsible for the use made of it after its return.

APPEAL from the County Court of Sangamon county; the Hon. J. H. MATHENY, Judge, presiding.

Mr. ROBERT L. MCGUIRE, for appellants; that the property was exempt, cited Laws of 1877, 102.

Messrs. HAMILTON & ROSETTE for appellees.

HIGBEE, P. J. This suit was commenced by appellees against appellants, to recover on a replevin bond, and resulted in a judgment in favor of the plaintiffs below, from which appellants appeal to this court.

On the 5th day of December, 1877, Rebecca Payne, as executrix, commenced a suit by attachment against Richards before a justice of the peace. The writ was delivered to Caleb Mower, a constable, who levied upon a horse as the property of Richards, and also served said writ by reading to him. Judgment was rendered against Richards, and an execution issued by the justice and placed in the hands of J. J. Warren, a constable of said county, for collection.

While the horse was in the possession of Mower, and before the judgment was rendered, Richards, claiming that the horse was exempt from execution, procured a writ of replevin for the horse, to be issued by another justice, and placed it in the hands of appellee, Rape, to be executed. Thereupon Richards, as principal, and White as his security, executed the replevin bond sued on in this case. The bond is to Thomas J. Rape, constable in the county of Sangamon and State of Illinois, and to his successors in office, conditioned as follows:

“The condition of this obligation is such that, whereas, on

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the 8th day of December, 1877, the said T. E. Richards sued out a writ of replevin before John D. Keedy, Esq., a justice of the peace in and for said county of Sangamon, against Caleb Mower, defendant, for the recovery of the following described goods and chattels, to wit: one bay stallion about nine years old, named Morgan. Now if the said T. E. Richards, plaintiff, shall prosecute his suit to effect and without delay, and make return of the said property, if the return thereof shall be awarded, and save and keep harmless the said constable in replevying the said property, then this obligation to be void," etc.

Upon receiving the bond, Rape executed the writ and delivered the horse to Richards, who subsequently delivered him to White, his security.

The replevin suit was decided against Richards, and a return of the horse awarded on the 19th day of December, 1877. Warner then having the execution in his hands, called on White, who delivered the horse to him, and he was levied upon and taken into possession by Warner.

The only question presented by the record for our decision is, was this a sufficient return of the property to discharge the obligation of the bond? Appellants insist that the return could only be made to Mower.

The object of a replevin bond under our statute is not merely to indemnify the constable, but also to furnish an additional remedy to the defendant in case the plaintiff fails to maintain his suit. The replevin act requires the constable to take this bond before executing the writ, and to return it with the writ to the justice, and makes him liable to the defendant in damages in case he fails to do so. These provisions are for the benefit of the defendant, and the act further expressly provides that the defendant may maintain an action for his own use, in the name of the constable, for any breach of the condition of the bond, and recover such damages as he has sustained. This he can do without first proceeding against the constable. *Petrie, use, etc. v. Fisher*, 43 Ill. 442. The real defendant in interest in the replevin suit was Mrs. Payne, and not the constable who levied the attachment. It was her rights intended to be secured by the bond. Mower, the constable who levied the attachment,

neither had or claimed to have any personal right in the horse. He simply held him for Mrs. Payne, the plaintiff, by virtue of the writ of attachment. When that proceeding ripened into a judgment, an execution was issued and placed in the hands of constable Warren for collection, and the horse delivered to and levied upon by him to satisfy the same.

This suit is brought for the use of Mrs. Payne, the real party in interest, to recover for the alleged failure to return the property, when in fact it was returned to satisfy the very same debt for which she originally caused it to be taken. Mower had returned his attachment, and no longer had any right to the possession of the property. The bond was made for the benefit of Mrs. Payne, and the property was returned to the only party authorized at the time to take it, and apply it to the payment of her judgment, and this fully satisfies the requirement of the bond. But it is said that after the horse was surrendered up to Warren, Richards again claimed it as exempt from execution, and that the constable, after causing it to be appraised by three disinterested persons, gave it up to him. This certainly cannot affect the rights of White, the security on the bond. His obligation was satisfied when the property was returned, and he cannot be held responsible for the use made of it after its return.

For these reasons the judgment of the court below is reversed.

Reversed.

THE PEOPLE OF THE STATE OF ILLINOIS, use, etc.

v.

M. C. McLain et al.

MASTER IN CHANCERY—FAILURE TO PAY OVER MONEY.—Scire facias was brought to assign new breaches on the bond of a master in chancery, for not paying over money received on a sale of lands under partition. The defendants contended that plaintiffs failed to show a decree of partition, and that the partition suit was not in equity. *Held*, that the proceedings in the case show that the partition suit was treated, all the way through, as a chancery proceeding, and the plaintiffs should not be defeated of their right to recover

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by such an objection; that even if it is admitted that if the proceeding in partition had been a purely statutory one, the sureties on the bond would not be liable. a point which the court do not decide, yet the distinction is so nice between that and a chancery proceeding in partition, that the court in order to uphold the jurisdiction in a collateral proceeding will refer the case to the law or chancery side, as may be necessary.

APPEAL from the Circuit Court of Coles county; the Hon. C. B. SMITH, Judge, presiding.

Messrs. D. T. & D. S. McINTYRE, for appellants; that the bill in the partition suit was in chancery, it being directed to the judge "in chancery sitting," and asking for summons against an infant defendant and the appointment of a guardian *ad litem*, cited Cost v. Rose, 17 Ill. 276; Nichols v. Mitchell, 70 Ill. 258.

Mr. ELI WILEY and A. M. PETERSON, for appellees; that preceding the order of sale the court should order a partition of the premises, cited Denning et al. v. Clark, 59 Ill. 218; LeMoynes v. Quimby et al. 70 Ill. 399.

There are two methods for partition, at law and in chancery; Louville v. Menard, 1 Gilm. 39; Greenup v. Sewell, 18 Ill. 50; Tibbs v. Allen, 27 Ill. 119.

The liability of sureties cannot be extended by implication: Field et al. v. Rawlings, 1 Gilm. 581; Sharp v. Bedell, 5 Gilm. 88; Governor et al. v. Lagow et al. 43 Ill. 134.

After a case is closed, it is not error for the court to refuse further testimony: Welsh et al. v. The People, 17 Ill. 339; Wilborn v. Odell, 29 Ill. 458; Sprague v. Craig, 51 Ill. 288.

LACEY, J. This was an action by *scire facias* by appellants, to assign additional breaches on the official bond of M. C. McLain, master in chancery, judgment having been recovered on the bond. The bond was in the penal sum of \$10,000, signed by M. C. McLain and the other defendants, dated Nov. 17, 1871. The additional breaches were filed by appellants Apr. 26, 1878, averring that the beneficial plaintiffs were the heirs of Philander Jones, who died seized of certain real estate

described, etc. That at the May term of said Coles county Circuit Court, the said court decreed partition of the land in the suit of Fred W. Jones et al. v. W. W. Shaw. That partition of the land was decreed, and the master in chancery ordered to make the sale. That on the 3d day of July, 1871, the master did make the sale, the master being Michael C. McLain, and who received on said sale the sum of \$3,215.00. That it was received during his term of office, and that he failed to pay it over. Among other pleas, defendants pleaded, it not being necessary to notice the other pleas: "That there was no record of the supposed recovery. That the proceeding mentioned in such breach was not a proceeding on the chancery side of the court, but a proceeding at law," etc. On the 24th day of the May term of the court the cause was heard by the court, and on the 33d day the court found the issues for defendant, and gave judgment against plaintiffs for costs. To reverse the judgment the cause is brought here. The plaintiffs read in evidence to sustain the issues the decree of partition and sale, and the order that the master in chancery make the sale. Also report of defendant McLain, the master in chancery, made at the Oct. term, 1873, showing a balance in his hands as master of over \$1,000. There was introduced the decree of court approving sale and ordering the master to pay over the money. The objection urged by appellees in bar of recovery is that the appellants did not prove the averments of their assignments of breaches. That they failed to show decree of partition, and that they also failed to show that the partition suit was in equity. That the original bill in the partition suit was not read in evidence.

The only denial in defendant's plea that there was a suit of partition in chancery as set out in the breach, was that it was not a proceeding on the chancery side of the court, but a proceeding in law, not raising the question of fact, whether there was such a proceeding in fact, but whether it was in chancery or at law. It was tendering an issue of law rather than a fact, hence the existence of the papers and record was not denied. By an examination of the bill for partition, decree and master's report, there can be no doubt that the partition suit was on the chan-

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cery side of the court. The case even, without the bill, sufficiently appears it is so treated by the court and by the master in his report of sale. If it be admitted, a point which we do not decide, that if the proceeding had been a purely statutory one, that the securities of the master would not be liable, yet the distinction is so nice between the chancery proceeding of partition, that the court, in order to uphold the jurisdiction of the court in a collateral proceeding, will refer the case to the law or chancery side of the court, as may be necessary. *Nichols v. Mitchell*, 70 Ill. 258. But taking the proceedings in this case, the decree of confirmation and of partition, and sale by the court and the report of master, it will be seen that the case was treated as one in chancery all the way through. The plaintiffs should not be defeated of their right to recover by such objections as these. The court erred in not rendering judgment on the assignment of breaches by plaintiffs for the amount shown to be due, by the evidence, the amount not paid over by defendant McLain, after allowing him his payments and all just charges. The judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded.

JOHN A. CRANE ET AL.

v.

DAVID B. HUTCHINSON ET AL.

1. PRACTICE—DEMURRER IN CHANCERY.—On a general demurrer to a bill in chancery, if the complainant is entitled to any relief on the case made by his bill, the demurrer should be overruled. It does not follow that because the complainant may not be entitled to all the relief prayed for, the demurrer should be sustained.

2. CONSIDERATION—MUTUAL PROMISES.—One promise is a sufficient consideration to support another promise, and where a person does any act beneficial to another or agrees to do so, that forms a sufficient consideration to support an agreement.

3. STATEMENT.—Appellants charged in their bill of complaint that appellee B. sold an undivided third interest in certain land to appellee H., in consideration of a cash payment and three notes of appellee H., payable in one,

two and three years, respectively; that B. gave to H. a bond for a deed on full payment of the notes; that B. afterwards indorsed said notes to appellants, who became the legal holders; that afterwards, by an agreement of all parties, B. executed a deed of the land to H., said deed to be delivered to H. on paying or securing to appellants said notes, and in the meantime the deed was to remain in *escrow* until compliance by H.; that H. fraudulently obtained possession of said deed and placed the same on record, and then conveyed said premises to P. without consideration. Prayer that said deeds be set aside, and for a lien upon said premises for payment of said notes, etc.

4. TENDER OF DEED NOT NECESSARY—ACTION NOT PREMATURE.—*Held*, on demurrer to the bill, that a tender by appellants of a deed to H. was not necessary before bringing suit; that the fact that one of the notes was not then due constituted no defense to the action; and that appellants were entitled to a decree setting aside the deeds mentioned.

APPEAL from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

Messrs MORRISON, WHITLOCK & LIPPINCOTT, for appellants; that the legal effect of the written agreement or title bond is a lien on the lands mentioned, cited *Davis v. Clay*, 2 Mis. 191; *Jones v. Slawson*, 1 Bail. ch. 463; 1 *Hilliard on Mortgages*, 660.

That a written agreement intended to give a lien for security of a debt is a good equitable mortgage: *Abbott v. Godfrey*, 1 Mann, 198; *Carpenter v. Mitchell*, 54 Ill. 126; *Wright v. Troutman*, 81 Ill. 374.

Mr. OSCAR A. DELEUW, for appellees; contending that there should have been a tender of a deed, cited *Baston v. Clifford*, 68 Ill. 67; *Burger v. Potter*, 32 Ill. 66; *Hulshizer v. Lamoreux*, 58 Ill. 72.

DAVIS, J. Appellants filed their bill in chancery against appellees, charging substantially that on the 16th of March, 1876, Barrett was seized in fee of an undivided third of lots two, three and four in block No. 25, in the old plat of Waverly, in Morgan county Illinois, on which was erected a steam flouring mill; and that on that day Barrett sold the same to David B. Hutchinson for the consideration of a certain sum of money paid down, and three notes of said Hutchinson of that date,

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payable to said Barrett; one for \$300 in one year, and the other two for \$350 each, payable in two and three years from date, all at ten per cent. interest from date. That at the same time Barrett executed to Hutchinson a bond for a deed, conditioned that he would make a deed of said undivided third of said lots on full payment of the three notes and interest first being made. That said bond had been duly recorded, and the possession of said premises given to said Hutchinson on the day of sale. The bill further charges that prior to the maturity of the first of said notes, Barrett indorsed and delivered them for full value to appellants who still have and hold the same. That Hutchinson had full notice that each of said notes had been assigned to, and were held by appellants, and had paid to them one year's interest due on said notes; and that the whole of said principal and the interest thereon from March 16th, 1877, remains unpaid. Bill further charges that on or about the first of February, 1878, Hutchinson applied to Barrett and desired him to make him a deed of the purchased premises, stating that he preferred to take a deed and take up the said notes and give to appellants a mortgage on the premises to secure the indebtedness. Barrett refused to make a deed without first consulting appellant Crane, and thereupon Hutchinson, Barrett and Crane met, and it was agreed between them that Barrett and his wife should make out, sign and acknowledge a deed of said premises, and deposit the deed with appellants to be held by them for the benefit of Hutchinson, and to be delivered to him only upon the full payment of said notes and interest. That pursuant to said mutual agreement, Barrett made out and signed a deed of said premises, and the same was given into the hands of a Mr. Arnett and Hutchinson for the purpose of procuring the signature and acknowledgment of the wife of Barrett, and when so signed and acknowledged, the deed was to be delivered to appellant Crane, to be held by him for the use of Hutchinson, and not to be delivered to him until the full payment of the said notes and interest.

The bill also alleges that said deed was never delivered by Barrett to Hutchinson, and was never intended to be delivered to him only upon his first paying in full all sums due on said

notes, but was intended to be deposited with said Crane or with said appellants as an *escrow*, to be held and only delivered upon the payment of said notes. It then charges that without the consent of Barrett, and without the knowledge or consent of Crane or appellants, Hutchinson fraudulently filed said deed for record in the recorder's office of Morgan county, on the 19th February, 1878, and had the same recorded, and that said deed contains no lien reserved to secure the payment of the balance of said purchase money, and that on the 14th of March, 1878, the said Hutchinson and his wife pretended to convey said premises to the appellee, Lambert Pond. Charges that said conveyance was a contrivance and a fraud, to cheat and defraud appellants, and was made without any consideration, and with a full personal knowledge on the part of Pond of the existence and non-payment of said notes, that said deed from Barrett and wife to Hutchinson had never been delivered to him, and also with a full knowledge of all the facts and circumstances connected with the transaction. Barrett, Hutchinson and Pond were made parties defendants to the bill, and appellants prayed that the deed from Hutchinson and wife to Pond, should be declared fraudulent and void as to them; that the deed from Barrett and wife to Hutchinson, should also be declared fraudulent and void, and be annulled and set aside; that the sums due to appellants on said notes be ascertained, and a lien declared to exist to secure the same; that Hutchinson be required to pay the amount found due, and on default that said premises be sold to pay the same; that Pond and Hutchinson be enjoined from encumbering or selling said property, and for general relief. To the bill, appellees, Pond and Hutchinson interposed a general demurrer, and on Barrett failing to answer, a default was taken against him, and a decree *pro confesso* rendered. On the hearing of the demurrer, it was sustained, and appellants abiding by their bill, a decree was rendered by the court below, dismissing the bill at costs of appellants. To reverse this decree this appeal was taken.

Appellees contend that the demurrer was properly sustained, because appellants did not tender a deed of the premises to Hutchinson before their bill was filed.

One answer to this objection is, that he was not entitled to a deed. By the express terms of the bond executed by Barrett to Hutchinson, which by an exhibit is made a part of the bill, the payment in full of the two first notes with interest, is made a condition precedent to the execution of the deed. The last note was not yet due, and the vendor was not bound to tender a deed until it was due and payable.

Another answer is, that even if a tender were necessary, Hutchinson, by his own fraudulent act in retaining possession of the deed, put it out of the power of appellants to make the tender.

Had he permitted the agreement mutually made between Barrett, Crane and himself to be honestly carried out, the deed would have been deposited with Crane, to be held until Hutchinson became entitled to it by the payment of the money due, or until after the maturity of the notes, when on a failure to pay them, a tender of the deed might have been made, if necessary, to enable appellants to sue and recover upon them. Equity will not permit a person to take advantage of his own wrong.

Another point made by appellees is, that the third note for \$350, due in March, 1879, was not due when the bill was filed.

The demurrer interposed was a general demurrer to the whole bill, and it does not follow that because appellants might not be entitled to all the relief prayed for, that it should have been sustained. The rule is that on a general demurrer to a bill in chancery, if the complainant is entitled to any relief on the case made, the demurrer should be overruled.

The only other point made by appellees is that there was no consideration, as between Hutchinson and appellants, for an agreement to leave the deed with them.

The facts as set out in the bill show that there was an agreement, supported by mutual promises, entered into between all the parties interested. Barrett on his part promised to execute the deed with his wife to Hutchinson, and deposit it with appellants, to be held by them for the benefit of Hutchinson, and to be delivered to him only on the payment of the notes and interest. Hutchinson, on his part, promised that the deed should be so deposited, and held by appellants until he should

pay the notes; and appellants on their part, through Crane, promised that the deed should be so executed, and that they would hold it for the benefit of Hutchinson until he paid such notes.

The rule is familiar that one promise is a sufficient consideration to support another, and that where a person does any act beneficial to another, or agrees to do so, that forms a sufficient consideration to support an agreement. *Cooke v. Murphy*, 70 Ill. 96. But we are not confined to this view of the case. The agreement entered into between the parties was evidently intended to protect the several interests or convenience of all concerned. The deed was to be deposited with appellants to afford them, by the control of it, some degree of security for the payment of the notes assigned to them; and by having it in their possession they would be in a position at all times to tender or deliver it when required. The deed signed and acknowledged by Barrett and his wife and deposited with appellants, would always be ready for delivery to Hutchinson immediately upon the payment of the notes, without loss of time or unnecessary delay in the preparation and execution of it. The delivery of the deed by appellants on the payment of the amount due would end the transaction, and relieve Barrett from his liability as assignor of the notes. To consummate this mutual arrangement the deed was placed in the hands of Hutchinson to obtain the signature and acknowledgment of Mrs. Barrett, when it was to be deposited with appellants to hold until the notes were paid. In violation of this trust Hutchinson retained the deed, filed it for record and had it recorded. This was a fraud upon the other parties to the agreement. Appellants and Barrett, or either of them, may justly call upon a court of equity to undo the wrong perpetrated by Hutchinson.

We think on the case made by the bill, if sustained by the proof, appellants would be entitled to a decree requiring Hutchinson to surrender to them the deed made to him by Barrett and wife; declaring the record of such deed null and void; that said deed was never delivered by Barrett and should be held as conveying no title to Hutchinson, and that the deed from

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Hutchinson to Pond should be held fraudulent and null and void as to appellants.

The court below having erred in sustaining the demurrer and in dismissing appellant's bill, the decree must be reversed and the cause remanded for further proceedings consistent with this opinion.

Decree reversed.

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v.
TOWN OF CLINTONIA.

ROAD TAX COLLECTED WITHIN A VILLAGE—TO BE PAID TO VILLAGE TREASURER.—The tax for road and bridge purposes levied and collected within the corporate limits of a village, under the provisions of the second clause of section 81, of the road law of 1877, should be paid over to the treasurer of such village, instead of to the treasurer of the commissioners of highways of the town.

APPEAL from the Circuit Court of DeWitt county; the Hon. LYMAN LACEY, Judge, presiding.

MESSRS. FULLER & MONSON, for appellant; that the tax should be paid over to the city treasurer, cited Laws of 1877, § 81; Rev. Stat. 1874, 916, § 16; Rev. Stat. 1874, 932, §§ 120-125; Baird v. The People, 83 Ill. 387; City of Galena v. Com'rs of Highways, 2 Bradwell, 255.

MESSRS. DONAHUE & LEMON, for appellee; cited Laws of 1877, § 81.

PER CURIAM. This was a bill of interpleader exhibited by Orlando P. Wilson, tax collector of the town of Clintonia, against the city of Clinton and town of Clintonia, on the 8th day of March, A. D. 1878, praying that they interplead and settle and adjust between themselves certain differences in relation to certain road and bridge tax collected by the said Orlando P. Wilson, tax collector.

City of Clinton v. Town of Clintonia.

The report of the master shows that the collector of the town of Clintonia had collected personal and real estate tax within the city of Clinton to the amount of the sum reported by the collector. The court below ordered the county treasurer, in whose hands the money had been placed, by interlocutory decree, to pay over all the money collected within the limits of the city of Clinton for road and bridge purposes to the treasurer of the commissioners of highways of the town of Clintonia. From this decree the city of Clinton prosecutes an appeal to this court, and assigns for error such decree. This money was collected under the provisions of the second clause of section 81, statute of 1877, concerning roads and bridges. Are the commissioners of highways of the town of Clintonia or the city of Clinton entitled to this money? The same question involved in this case was decided by this court in the case of *Cyrus McFarland et al. v. The People*, who sue for the use of the town of Rantoul at the present term, (2 Bradwell 615) and we here adopt the opinion expressed in that case as the opinion in this, so far as the principles and reasons therefor are there announced. We there decided that such tax collected belonged to the corporate authorities of the village of Rantoul. So in this case, under the provisions of the statute under which this tax was collected, this money belongs to the city of Clinton, and the court below should have ordered the county treasurer to pay the money over to the treasurer of the city of Clinton, instead of the commissioners of highways of the town of Clintonia. For this error the decree of the court below is reversed and the cause remanded, with directions to the court below to proceed in accordance with this opinion.

Reversed and remanded.

Carson v. City of Bloomington.

SARAH CARSON
v.
CITY OF BLOOMINGTON.

VERDICT AGAINST EVIDENCE.—The Court, from an examination of the record, being of opinion that the verdict is against the evidence, reverse the judgment of the lower court, and remand the cause, but as the case will be submitted to another jury, the evidence is not discussed in detail.

APPEAL from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

Messrs. BLOOMFIELD & HUGHES, for appellant; against the admission of the city ordinances as evidence, there being no authority for enacting such ordinances, cited *City of Alton v. Hartford Fire Ins. Co.* 72 Ill. 328.

The court erred in remanding the defendant to the custody of the sheriff till the fine and costs were paid: *Kinmundy v. Mahan*, 72 Ill. 462.

This action was debt for a penalty when it was tried on appeal from the justice: *Hoyer et al. Town of Mascoutah*, 59 Ill. 137.

PER CURIAM. The defendant was prosecuted before a justice of the peace for a violation of the ordinance of the city of Bloomington. On appeal to the Circuit Court defendant was found guilty, and a fine of twenty-five dollars assessed against her. She entered a motion for a new trial, for the reason, among others, that the verdict was against the evidence. This motion was overruled and judgment rendered against her, and the cause brought here by appeal.

It is assigned for error that the judgment is against the evidence, and after a careful examination of all the proof in the record, we think the error well assigned.

As the case will go before a jury again, we are not disposed to discuss the evidence in detail, but we think the verdict so clearly and manifestly against the weight of the evidence as

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to show that injustice has been done appellant, and that her case should be again submitted to a jury.

Appellee's attorneys probably entertain the same view, as they file no brief in the case.

Judgment reversed and cause remanded.

Reversed and remanded.

DAVIS, J. I think this cause should be reversed and remanded, but not for the reasons given by the court.

CHARLES M. DALLY ET AL.

v.

ELBERT S. YOUNG.

1. JUDGMENT—MUST BE AGAINST ALL—A judgment at law must be a unit, and being erroneous as to one defendant, it must be reversed as to all.

2. MALICIOUS PROSECUTION—ACTS OF AGENT.—The evidence fails to show that one of the defendants, L, in any way aided, advised or consented to the prosecution of the plaintiff by his sub-agent D, and the judgment cannot be supported as to him. The fact of such agency would not of itself make him liable for a criminal prosecution commenced without his knowledge by a sub-agent. The principal will not be liable unless, with knowledge of all the circumstances, he adopts and continues such prosecution.

APPEAL from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

Messrs. BLOOMFIELD & HUGHES, for appellants; that there must be malice and want of probable cause, to entitle a party to recover in actions for malicious prosecution, cited *Anderson v. Friend*, 85 Ill. 135; *Leidig v. Rawson*, 1 Scam. 272; *Jacks v. Stimpson*, 13 Ill. 702; *McBean v. Ritchie*, 18 Ill. 114; *Bourne v. Stout*, 62 Ill. 261.

Acquittal of accused does not imply want of probable cause: *McBean v. Ritchie*, 18 Ill. 114; *Israel v. Brooks*, 23 Ill. 575; *Thorpe v. Balliett*, 25 Ill. 339; *Anderson v. Friend*, 85 Ill. 135.

If the prosecution in controversy is not shown to have been

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tried on its merits, actual malice must be shown in a proceeding for malicious prosecution: *Hurd v. Shaw*, 20 Ill. 354; *Ross v. Innis*, 26 Ill. 259; *Wicker v. Hotchkiss*, 62 Ill. 107; *Ames v. Snider*, 69 Ill. 376; *Anderson v. Friend*, 71 Ill. 479; *Anderson v. Friend*, 85 Ill. 135.

If the prosecutor acts under the advice of a respectable attorney, given after full and fair presentment of all the facts, he will be protected: *Anderson v. Friend*, 85 Ill. 135.

Probable cause is a reasonable ground for suspicion, sufficiently strong to warrant a cautious man in the belief of the guilt of the person accused: *Davie v. Wisher*, 72 Ill. 262.

A judgment must be against all the defendants or none: *Earp v. Lee et al.* 71 Ill. 193; *Jansen et al. v. Varnum et al.* 11 Chicago Legal News, 59.

Messrs. ROWELL & HAMILTON, for appellees; that the witness was allowed to give the whole of his statement to counsel, and it was not error to refuse to allow him to be led by direct questions, cited *Whitefield v. Westbrook*, 40 Miss. 311.

The prosecution of a person criminally with any other motive than that of bringing him to justice, is a malicious prosecution: *Krug v. Ward*, 77 Ill. 603.

The term malice in this action is to be considered as denoting that the party is actuated by improper and indirect motives: *Harphan et al. v. Whitney*, 77 Ill. 32.

Advice of counsel must be sought in good faith, and a full statement of all the facts must be made: *Murphy v. Larson*, 77 Ill. 172; *Ross v. Innis*, 26 Ill. 259; *Kimmel et al. v. Henry*, 64 Ill. 505.

PER CURIAM. This was a suit brought by appellee against appellants, Charles M. Dally, E. Lathrop and the Remington Sewing Machine Company, in case, for a malicious prosecution.

The declaration avers that on the 9th day of January, 1876, the defendants, Charles M. Dally acting for himself and on behalf and at the instigation of the defendants E. Lathrop and Remington Sewing Machine Company, appeared before a justice of the peace and falsely, maliciously, and without any

reasonable and probable cause charged the plaintiff with having in his possession \$1,000, in promissory notes, drawn in favor of the Remington Sewing Machine Company, and \$90 in money of the goods and chattels of said company, and that he had embezzled the same.

A verdict and judgment were rendered against all the defendants below for \$3,000 and the case is brought here and numerous errors assigned, but as this case will be submitted to a jury again, we do not feel called upon to discuss questions involving a consideration of the evidence. We have examined the record carefully, but find no evidence in it showing or tending to show that defendant Lathrop either aided, abetted, advised or consented to the prosecution of appellee, or that he ever had any knowledge of such prosecution until after he was discharged from arrest and the prosecution dismissed.

The judgment at law must be a unit, and being erroneous as to one, must be reversed as to all. *Jansen et al. v. Varnum*, 11 Chicago Legal News, 59.

It is true, Lathrop was the general agent of the company at Chicago, and that Dally was a sub-agent at Bloomington, and subject to his jurisdiction in all matters pertaining to the business of the company, but this circumstance of itself would not make him liable for a criminal prosecution commenced by Dally without his knowledge or consent.

Where an agent institutes a malicious prosecution of his own head, and without the instigation or direction of his principal, the latter will not be liable for the same, unless he adopts and continues the same with knowledge of all the circumstances. 2 Addison on Torts, p. 758; *Burnop v. Albert*, Taney's C. C. Dec. 244; *Stevens v. Midland Co. R. W. Co.* 10 E. C. L. R. 351. Judgment reversed and cause remanded.

Reversed and remanded.

Hutches et al. v. Adams.

DAVID HUTCHES ET AL.

V.

MILLIE W. ADAMS.

1. PLEADING.—A plea which seeks to divest a plaintiff of her legal title to lands, by setting up a judicial conveyance to another, is defective if it fails to show a decree against the plaintiff authorizing such conveyance.

2. DECREE SHOULD BE PLEADED.—In all cases of judicial conveyances, it is necessary, in order to show a valid title, to show a valid decree and deed. The decretal order should be pleaded in order to show that the plaintiff was a party to and bound by it, and that the order did in fact authorize the conveyance of the plaintiff's right in the land.

APPEAL from the Circuit Court of Cass county; the Hon. A. G. BURR, Judge, presiding.

Messrs. WARLOW & LEEPER, for appellants; that the rent passes to the grantee as an incident of the reversion, and the consideration of the note had failed, cited Crosby v. Loop, 13 Ill. 625; Dixon v. Niccolls, 39 Ill. 372.

Mr. RICHARD W. MILLS, for appellee.

PER CURIAM. A petition for re-hearing is presented in this case, urging that the court below erred in sustaining a demurrer to appellant's second plea.

The plea avers that Hutches, one of the defendants below, leased certain real estate therein described from the plaintiff below, Millie W. Adams, for one year, beginning on the 1st day of March, 1877, and ending on the 1st day of March, 1878; and that in March, 1877, Richard W. Mills, Master in Chancery, etc., under and by virtue of a decretal order of the Circuit Court of said county, as such Master executed and delivered to Orrin Kendall a deed conveying to him all the right, title and interest of the plaintiff to the lands aforesaid, being the same lands described in the lease, and that the purchaser, Kendall, entered into and became possessed of the lands aforesaid prior to the 1st day of March, 1878. That the note sued on was given for said rent, and that the consideration had failed, etc.

Beam et al. v. Laycock et al.

This plea is fatally defective. It seeks to divest the landlord of her title by a judicial conveyance, without showing a decree against her authorizing the same.

In all cases of judicial conveyances it is necessary in order to show a valid title, to show a valid decree and deed. The averment is that the Master conveyed all her right, title and interest by virtue of a decretal order. The order should have been pleaded to show that plaintiff was a party to it and bound by it, and that it did in fact authorize the conveyance of her right to the land. Every intendment is taken most strongly against the pleader.

The averment that the Master conveyed the title is not sufficient without showing his authority, and the averment that he had a decretal order without showing what it authorized him to do, or who were parties to it, is wholly insufficient.

The demurrer was properly sustained, and a re-hearing is denied.

SAMUEL C. BEAM ET AL.

v.

SAMUEL A. LAYCOCK ET AL

3	43
73	611
8	43
178	217

1. PRACTICE—EXCEPTION, HOW TAKEN.—Where exception is desired to be taken in this court to the admission of improper evidence on assessment of damages, the party objecting should move to set aside the assessment, and on refusal should preserve an exception.

2. PLEADING.—A plea of *nil debet* being improper, and no answer to the declaration, it was properly stricken from the files, and defendants not offering to plead further unaccompanied with an affidavit of merits, it was not error for the court to render judgment *nil dicit*.

APPEAL from the Circuit Court of Logan county; the Hon. W. E. DICKS, Judge, presiding.

Mr. OSCAR ALLEN and Messrs. BEASON & BLINN, for appellants; that an affidavit of merits cannot be filed with the declaration on an appeal bond, cited Rev. Stat. 1874, 779, § 37.

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An affidavit of merits cannot be used as evidence in assessing damages upon a bond: Rev. Stat. 1874, 779, § 38.

Messrs. HOBLIT & STOKES, for appellees; that the court might render judgment upon affidavit filed with the declaration, cited Rev. Stat. 1874, 779, § 37; Kern v. Strasberger et al. 71 Ill. 303.

That appellants cannot object for the first time in this court to the assessment of damages: Bowden v. Bowden, 73 Ill. 111.

PER CURIAM. This cause was heard and judgment affirmed at the present term. Appellants file petition for a re-hearing.

We have considered the petition and arguments of appellant's counsel, and must adhere to the decision already made in the case.

Appellants suppose that this court decided that the appeal bond was such a contract that under sec. 37 of the Practice Act, affidavit might be attached to it, and proof as to the amount of damages are dispensed with, unless defendant should file a plea accompanied with affidavits of merits to their plea. The court did not, in considering the case, deem it necessary to pass upon that question. It appeared, from the record, that appellants did not move in the court below to set aside the assessment of damages and take exception to the ruling of the court in refusing to do so. In case of default, and where exception is desired to be taken in this court, to the improper admission of evidence taken on the hearing, of the assessment of damages, it is necessary after the assessment, for the party objecting to move the court to set aside the assessment, and in case of refusal to preserve exception. Unless this be done no objection can be taken in this court to the improper admission of evidence. McCord v. M. N. Bank, 84 Ill. 49; C. & R. I. R. R. Co. v. Ward, 16 Ill. 522. The other error assigned, that the court below refused to strike the affidavit of merits attached to declaration from the files is not well taken. In the first place the plea of *nil debet* was filed, and on motion of appellees, was stricken from the files by the court. The plea of *nil debet* was improper, and no answer to the declaration, and properly stricken from the files, for that reason. After this plea was

Cox v. McLean.

stricken from the files appellants did not ask leave or offer to plead unaccompanied with affidavit of merits. Hence it was proper to render judgment *nil dicit*. Fanning v. Russell, 81 Ill. 398.

If defendant did not offer to, or desire to plead, no harm could be done to him by the action of the court in refusing to strike the affidavit of merits attached to the declaration from the files.

The motion for re-hearing is denied.

THOMAS J. COX

v.

RICHARD H. McLEAN.

MALICIOUS PROSECUTION—PROBABLE CAUSE—CONVICTION NOT NECESSARY.—In cases of malicious prosecution it is not necessary for the protection of the prosecutor, that the person charged with an offense should be convicted. It is enough that there is a reasonable ground to believe the party guilty as charged, and that the prosecutor acts with caution and without malice. This action can only be sustained when the prosecutor acts from malice and without probable cause—both must concur.

APPEAL from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

Mr. I. J. BLOOMFIELD, for appellant; argued that if the prosecutor acts in good faith, on evidence, whether true or false, he is protected, and cited Anderson v. Friend, 85 Ill. 135.

Where the prosecuting witness presents all the facts to an attorney and acts upon his advice, he will be protected Anderson v. Friend, 85 Ill. 135; Ross v. Innis, 26 Ill. 259.

This is the rule, even though the advice so given was wrong, or the attorney was mistaken as to the law: Anderson v. Friend, 85 Ill. 135; Potter v. Larle, 8 Cal. 217; Leird v. Davis, 17 Ala. 27; Bliss v. Wyman, 7 Cal. 257; Gould v. Gardner, 8 La. An. 12; Williams v. Van Meter, 8 Mo. 339; Waller v. Sample, 25 Pa. St. 275.

Appellant should have been allowed to show why the prosecution was abandoned: *Anderson v. Friend*, 71 Ill. 475; *Collins et al. v. Fisher*, 50 Ill. 359.

It was error to allow appellee to show that a verdict of not guilty was rendered: *Skidmore v. Bricker*, 77 Ill. 164.

Malice and want of probable cause must concur: *Leidig v. Rawson*, 1 Scam. 272; *Bourne v. Stout*, 62 Ill. 261; *Anderson v. Friend*, 85 Ill. 135.

A failure to pay a debt due for goods sold on commission, after demand made, constitutes a criminal offense: *Warringer v. The People*, 74 Ill. 346.

HIGBEE, P. J. This was a suit brought in the court below by appellee against appellant, in case, to recover for an alleged malicious prosecution. Appellant caused appellee to be arrested before a justice of the peace, and subsequently to be indicted by the grand jury for a violation of section 78 of the criminal code, which makes it a misdemeanor for any warehouseman, forwarding or commission merchant, or other person selling on commission, to convert to his own use any flour, grain, etc., or the proceeds or avails thereof, without the consent of the owner, or who shall fail to pay over the avails or proceeds thereof, less his proper charges, on demand, by the person entitled to receive the same. The substantial charge made in the affidavit for the arrest and indictment, was that a certain mill company, of which appellant was one of the owners, had shipped to a mercantile firm of which appellee was one of the members, flour to be sold on commission, and that they had refused to pay over the proceeds of sales after demand made for the same.

The main facts appearing in the record are that the flour was shipped to appellee's firm and received by them by one Washburn, a clerk in the mill, upon terms agreed upon between them and the clerk. That neither appellant or any member of the mill firm had any personal knowledge of the transaction, but derived all of their information from Washburn, their clerk, who transacted the business. The mill firm was in the habit of furnishing flour to dealers to be sold on commission. Subsequently, the grocers to whom the flour was shipped, were found

to be in failing circumstances, and Cox, the appellant, called on his attorney, Mr. Hughes, and consulted him in reference to his demand. Mr. Hughes asked him if the flour was delivered to them to be sold on commission. He told him he thought it was, but could not tell until he consulted Washburn, the clerk, who made the arrangement. He then took Washburn to see Hughes, and he stated to Hughes in the presence of Cox that the flour was furnished to appellee's firm by him to be sold on commission. Cox also informed Hughes that the drayman who delivered it told appellee that it was sent to be sold on commission, and this statement was fully justified by the evidence of the drayman subsequently given.

Appellant did not profess to have personal knowledge of the transaction but took the precaution to go to the only persons cognizant of the facts and inform himself with reference thereto before any definite action was taken in the matter, and this information he correctly and truthfully imparted to his attorney and asked his advice.

The attorney, who was one reputable and skillful in his profession, then informed appellant of the law upon the subject, and advised that a demand be made for the flour or the money, and in case of a refusal to deliver the same, that an arrest should be made. Cox then employed his attorney to go and make the demand for him, which he did, and upon appellee refusing to deliver to him the flour or the proceeds thereof, Cox, acting under the advice of his attorney, swore out a warrant and caused the arrest to be made, and subsequently, acting upon the same information and advice, caused an indictment to be found and returned. Upon the trial of these charges appellee was acquitted. It now appears from the evidence that instead of the flour having been furnished to be sold on commission, it was sold by Washburn, the clerk to appellee's firm. This fact was not known to appellant until after the trial on the indictment.

A conviction of one charged with crime is not necessary to the protection of the prosecutor. It is enough that there is probable and reasonable ground to believe the party guilty, and that the prosecutor acts with reasonable caution and

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without malice. The criminal law must be enforced, and human agencies must be employed for that purpose, and the law wisely protects all persons who in good faith act on reasonable presumptions of the guilt of the accused. This action can only be maintained where the party causing the arrest has acted from malice and without probable cause—both must concur. Does this case meet these requirements? We think it falls far short of it. Appellant seems to have acted from honest motives, under the advice of his attorney, after fully informing him of all the facts known to him. He sought his information as to the terms upon which the flour had been delivered from the proper sources, and neglected no means, apparently, within his reach to fully and correctly inform himself as to the nature of the transaction. If he was deceived by his clerk, it certainly was not his fault. Had the information which he received from him proved correct, the arrest would have been entirely proper.

That he believed the statements of his clerk can hardly be doubted.

There is no evidence of actual malice, and we think appellant, under the circumstances of this case, acted upon reasonable and probable cause, and without malice.

The judgment is therefore reversed.

Judgment reversed.

THOMAS A. APPERSON

v.

O. W. GOGIN ET AL.

1. SPECIFIC PERFORMANCE—CHANCERY JURISDICTION.—The bill of complaint alleged the obtaining of certain judgments against the complainant, and a subsequent written agreement, whereby in consideration that the personal property therein mentioned would be delivered to the judgment plaintiff as therein agreed, the values fixed therefor should be credited to the complainant on said judgments until the same were satisfied. The bill further charged that the property had been delivered and that complainant had complied on his part with the agreement, but that credit therefor had not

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been given on the judgments. The court dismissed the bill on the ground that there was adequate remedy at law. This was an error. Nothing short of a specific performance of the agreement would be an adequate remedy, and equity alone can afford that remedy; and when equity obtains jurisdiction it will do complete justice between the parties under the contract, and adjust all questions arising under it.

2. **ESTOPPEL.**—The complainant and the sureties on his notes, by entering into the agreement for payment of the judgments, are estopped to deny the validity of such judgments on the ground that there was no sufficient power of attorney authorizing the entering of the same.

3. **EVIDENCE—DEATH OF PARTY.**—One of the defendants having died pending the suit, the complainant is incompetent to testify in his own behalf as to transactions occurring with such defendant previous to his death; and two of the other defendants whose interest was in common with the complainant in the result of the suit and opposed to the estate, were also incompetent to testify.

4. **PRACTICE—DEFAULT.**—It was error to enter a default against defendants while their answers were on file, and such default should be set aside.

ERROR to the Circuit Court of Cumberland county; the Hon. J. C. ALLEN, Judge, presiding.

Messrs. DECIUS & EVERHART and Mr. HORACE S. CLARK, for plaintiff in error; that the judgments ought not to be sustained unless strictly within the power given in the notes, cited *Chase v. Dana*, 44 Ill. 262; *Fry et al. v. Jones*, 78 Ill. 627; 5 *Hill*, 497; 44 Ill. 263.

That the computation of interest on the notes was illegally made, no allowance for interest on payments being given: *McFadden v. Fortier*, 20 Ill. 509; *Heartt v. Rhodes*, 66 Ill. 351.

No judgment for attorney's fees could be had under the terms of the notes: *Nickerson v. Babcock*, 29 Ill. 497.

The contracts are a satisfaction of the judgments: *Smith v. Hickman*, 68 Ill. 314; *Hoag v. Starr et al.* 69 Ill. 365.

The testimony of defendants, McAllister and Albin, was competent: *Rev. Stat.* 1874, 488.

The case is one calling for equitable relief, and the court had jurisdiction: *Adam's Eq.* 460; *Kerr's Injunctions* in *Eq.* 13; *Smith v. Hickman*, 68 Ill. 314; *Babcock v. McCamant*, 53 Ill. 215; *Hoag v. Starr*, 69 Ill. 365; *Sammis v. Clark*, 17 Ill. 398.

It was not error to allow amendments to the bill: *Rev. Stat.*

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1874, 137; Jackson v. Warren, 32 Ill. 331; Gibson v. Rees, 50 Ill. 383.

The order rendered in vacation, dismissing the bill, had no validity: Edwards v. Evans, 61 Ill. 492; Governor v. Dodd, 81 Ill. 162; Hughes v. Washington, 65 Ill. 245; Schneider v. Seibert, 50 Ill. 284; Stevens v. Coffeen, 39 Ill. 148.

Mr. J. F. HUGHES, for defendants in error; that the complainant and defendants, Albin and McAllister, were incompetent to testify as to transactions occurring before the death of defendant Wilson, cited Rev. Stat. 1874, 488; Whitmer v. Rucker, 71 Ill. 410; Alexander v. Hoffman, 70 Ill. 114; Com'rs v. Kansas Pacific R. R. Co. 9 Chicago Legal News, 369; Boester v. Byrne, 72 Ill. 466.

That there was an adequate remedy at law: Stewart v. Mumford, 80 Ill. 192.

The signing of the certificate of evidence in vacation without a previous order therefor, was error: Hance v. Miller, 21 Ill. 639.

The defendant in error may file an additional abstract of record: Rowley v. Hughes, 40 Ill. 71.

LACEY, J. Finley P. Wilson obtained three several judgments in vacation, by virtue of power of attorney contained in notes to confess judgment in vacation, in the Circuit Court of Cumberland county: one judgment for \$872 and costs against the complainant, Thomas A. Apperson, July 7th, A. D. 1875; one on July 9th, A. D. 1875, against the complainant and George W. Albin for \$1,484; also one on the last mentioned date against complainant, George W. Albin, and Robert McAllister, for the sum of \$1,349.80 and costs. George W. Albin and Robert McAllister were security for Apperson on the above notes. On the 13th day of July, A. D. 1875, Apperson and Finley A. Wilson entered into a written contract in reference to the satisfaction of the several judgments in substance, after reciting the above judgments, and reciting that they desired to effect a settlement of the said judgments without a levy and forced sale of the property of defendants,

providing for the payment and settlement of the judgments in the order of their priority; and further providing that Apperson should turn over and deliver to said Wilson one hundred head of stock hogs then owned and possessed by said Apperson, which hogs were to be received by Wilson on the said judgments for \$6 per hundred—Apperson having privilege to furnish buyer at better price within the next ten days. It was further agreed that Apperson should deliver to Wilson 120 acres of grass then standing and growing on the resident farm of Apperson, in Cumberland county; that Apperson should be permitted by Wilson to harvest and stack the grass on the premises where it then stood, to be done in a good, husbandman-like manner, and without expense to Wilson. One hundred tons of hay was to be credited on the judgments at least at \$6 per ton, Apperson being at liberty to procure a better market any time before the first day of November, the rise being credited also. Apperson also was to deliver to Wilson 60 acres of corn then growing and standing on his home farm, 2,000 bushels of which was to be credited on the judgments at 30 cents per bushel and the rise of the market to January 1st, 1876. It was further agreed that Apperson should sell and deliver to Wilson at the farm of Apperson 120 head of smooth, nice Texas cattle, to average about 1,000 lbs., ranging from 850 to 1,100 lbs. each, at the price of \$4 per hundred pounds. The sum of \$1,905 of the value of the cattle was to be credited on these judgments, and for the balance Wilson was to give Apperson his note with bankable securities, due in 6 months from date. The contract further recites that the judgments contained a penalty of 4 per cent. per month after the maturity of the notes on which the judgments were rendered, and reciting that it was not desired by Wilson to exact the penalty, it was agreed that on the final settlement of the judgments each party was to do what was right in the matter, and if they could not agree what *was* right, that Dr. Albin and Robert McAllister should say what was right, their decision to be final between the parties. It was further agreed that the judgments and executions should remain in full force as they then stood until discharged by full performance of the contract, the levy on about 15 yearlings and six

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two-year olds and one three-year old cattle to be released. The consent to the contract of Albin and McAllister was given by them by their agreement on the back of the contract. The bill in this case was filed by complainant, Apperson, against the above named Albin, McAllister, and Finley P. Wilson, Jan. 29, 1876. At the August term, 1876, the death of F. P. Wilson was suggested, and O. W. Gogin, his executor, was made party.

The above state of facts were set up in the bill. The complainant avers in his bill that he delivered the corn, hogs, hay, and cattle, and in everything substantially complied with the written agreement. Complainant further avers that on the 17th day of July, A. D. 1875, the parties to the original agreement modified that agreement by a verbal agreement in relation to the Texas steers specified in the written agreement; that complainant was to furnish Wilson pasture; that Wilson was to loan complainant \$3,000 in St. Louis, by 13th Aug., '75, to enable complainant to buy cattle; that Wilson did not furnish the money in the time agreed, but did furnish \$2,800 after that time, and after cattle had risen in market, to the large damage of complainant. The bill charges that Wilson refused to satisfy the judgments and release the levies, and was ordering the sheriff to collect them.

The bill prays that the judgments be declared satisfied and canceled and the executions quashed.

The bill was afterwards amended setting up that the judgments were confessed without proper warrant or authority and were void, etc. Alleges the judgments were satisfied in full; that Wilson in his life time received \$368.88, and it has never been credited; avers the death of Wilson and appointment of Gogin as his executors, etc. That since the suit was commenced, the attorneys of Wilson have entered full satisfaction of the judgment against complainant alone, and given credit on the judgment against complainant and Albin of \$240.15, for hogs and corn delivered to Wilson under the contract. That they refused to enter credit for cattle furnished, for hay delivered and for pasture furnished. The executor Gogin, answered and admits the allegations in the bill, except that he denies judgment was entered without authority of law; that the

contract was a settlement and satisfaction of the judgment; denies that complainant complied with the contract, and denies verbal contract, etc. The answer sets up demurrer to bill for the reason that the complainant has a remedy at law. Albin and McAllister also filed their answers.

The cause was referred to the master, and a good deal of evidence was taken in the case, tending to show that there were large sums of money due complainant under the written contract not credited, on account of the Texas cattle furnished by complainant to Wilson; also on account of the 100 tons of hay, some evidence also tending to show there had been a verbal change of contract in regard to furnishing money. But as to the question, how much there is due to complainant under the original contract or its modification, if anything, we purposely refrain from expressing an opinion, for the reasons that the question will have to be passed upon by the court below. It appears that after the case was submitted to the court below for its decision, the court found that the complainant as to all the material allegations in the bill, had a complete remedy at law, and therefore dismissed the bill. Thus the court refused entirely to consider the merits of the case. We are satisfied that in thus deciding the court erred.

This is not a case where one attempts to obtain in equity a set-off of a mere demand, sounding in damages against a judgment at law.

The agreement in this instance by its terms, provided that when, and as fast as the complainant fulfilled it, the amount should be applied in satisfaction of the several judgments: hence to the extent the contract was fulfilled, the judgments were satisfied in equity. How could it be said complainant had a complete remedy at law, when if he should sue on the contract at law, the only recovery he could obtain, would be the amount due under the contract by the rules of the law, in such case applicable to the measure of damages. But by this agreement the performance of the contract was to be the satisfaction of the judgments. The recovery at law would leave the judgments wholly unsatisfied, and the plaintiff in the judgments would be free to sell the property of complainant under

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execution, or compel complainant to pay them off, when in justice they should be satisfied.

Nothing short of a specific performance of the agreement in this case would be an adequate remedy, and equity alone can afford that remedy. And again when equity obtains jurisdiction it will do complete justice between the parties under the contract, and adjust all questions arising under it.

A question by appellant has been raised by his bill and in his argument as to the validity of the judgments in the first instance, on the ground that there was no sufficient power of attorney to authorize the confession of judgments in vacation. We are of the opinion that complainant by entering into the written contract, and Albin and McAllister by consenting to it, are estopped from disputing the validity of the judgments. The contract admits their validity, and they *are* the basis of the contract. When the complainant asks performance of the contract on the part of Wilson, he must allow Wilson the benefit of the consideration for such performance, the satisfaction of the judgments which complainant had agreed to receive in payment in part for his cattle, hogs, corn, &c., to be delivered. The question has been raised as to the admissibility of the evidence of complainants, George W. Albin and Robert McAllister. Their evidence was inadmissible and should have been rejected. As to the complainant, the defendant Gogin was the opposite party, as the executor of Finley P. Wilson, deceased, and is expressly prohibited by statute to testify; and as to the other two, their interest is identical with that of the complainant, although they are respondents in the case. Their interest is directly opposed to Gogin, the executor of Wilson, deceased, their co-defendant, and if admitted would tend to defeat his claim and decide the cause of action in favor of complainant, and relieve themselves from the payment of the judgment in favor of Gogin, executor, against themselves. They fall within the spirit and meaning of the statute. *Alexander v. Hoffman et al.* 70 Ill. 114; *Winter v. Rucker et al.* 70 Ill. 410. Their evidence should be excluded.

Default was taken in the court below against Albin and McAllister while their answer was on file. This was error, and

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such default should be set aside. The decree in this cause is reversed and the cause remanded, with leave to complainant to amend his bill if he so desires. The court below should hear and determine all the rights of the parties under the contract, either as originally made or modified, if the evidence shall show any modification of it. Whatever may be found to be due to complainant, if anything, after hearing all the evidence taken or to be taken, the court should credit on the judgments. The court should do complete equity between the parties.

Reversed and remanded.

JOHN D. JOHNSON
v.
JOHN W. SOMMERS.

1. EVIDENCE—LEVY OF EXECUTION.—Defendant pleaded that he took the property in dispute by virtue of an execution in his hands as sheriff, and after reading the execution in evidence, offered to show that he took the goods in question by virtue of such execution, which was refused. This was error. The evidence directly tended to prove the issue, was material and competent.

2. AMENDING LEVY BEFORE RETURN.—Defendant then offered in evidence the endorsement of levy on the back of the execution, which was general in its terms, which was refused, and thereupon the sheriff amended his levy by making a schedule particularly describing the goods levied upon, the execution being still in his hands for collection and had not been returned. *Held*, that the levy of the officer was proper evidence, and should have been admitted.

APPEAL from the County Court of Champaign county; the Hon. J. W. LANGLEY, Judge, presiding.

Messrs. SOMERS & WRIGHT, for appellant; that while an execution is in the hands of an officer he may change the indorsement thereon, cited *Nelson et al. v. Cook*, 19 Ill. 450.

That goods seized by virtue of an execution are not subject to replevin unless they are exempt from execution: Rev. Stat. 851, § 2.

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Mr. M. B. THOMPSON, and Mr. WILLIAM B. WEBBER, for appellee; that the sheriff, by breaking into the premises of appellee, was a trespasser, and his pretended levy, therefore, void *ab initio*, cited 2 Hilliard on Torts, 93.

An officer interested in a cause cannot amend his return on process: O'Connor v. Wilson, 57 Ill. 226; Snyder v. Brosse, 51 Ill. 357.

HIGBEE, P. J. This was an action in replevin by appellee against appellant for a stock of drugs.

Defendant below pleaded that he was sheriff and as such an execution came to his hands for collection against appellee, and that he levied the same on the goods replevied as the property of appellee. To this plea a replication was filed traversing and taking issue upon it.

On the trial, after the plaintiff below had rested his case, the defendant testified in his own behalf that he was sheriff of the county, read in evidence the execution described in the plea, and was asked by his attorney to state in substance whether he levied upon and took the goods replevied, under and by virtue of the execution, as the property of the plaintiff in the replevin suit. On objection by plaintiff, the court refused to permit defendant to answer the question. This was error. The evidence directly tended to prove the issue, was material, and was competent evidence to prove the fact sought to be established.

Defendant then offered in evidence the indorsement on the back of the execution, showing the levy on "one general stock of drugs and other articles, such as soaps, tobacco, etc., etc.," as the property of the defendant in execution. To which offer objection was made, and the defendant then attached to his execution a schedule more particularly describing the articles, and amended the levy by referring to, and making the schedule a part of, the same; and then again offered to read the same in evidence; but the court sustained the objection, and refused to admit the levy in evidence. It seems from the evidence of the sheriff that at the time he amended the levy and offered it in evidence, the execution was still in his hands for

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collection, and had not been returned. The levy of the officer was proper evidence, and should have been admitted by the court. The refusal by the court to admit the evidence of defendant was necessarily followed by a judgment against him from which he appeals to this Court, and assigns for error the ruling of the court in refusing to receive the evidence offered. We think the errors well assigned, and for that reason the judgment below is reversed and the cause remanded.

Reversed and remanded.

EDWIN HAYS ET AL.

V.

THE PEOPLE OF THE STATE OF ILLINOIS, use, etc.

1. JUSTICE OF THE PEACE—FAILURE TO DELIVER OVER PAPERS—LIABILITY OF SURETIES.—The duty of delivering to the person entitled thereto, all papers in his hands as an officer, upon proper demand therefor, is expressly enjoined by the statute upon a justice of the peace, and for a failure to do so his sureties on his official bond are liable.

2. MEASURE OF DAMAGES.—For a failure to deliver up, when demanded, securities left with him for collection, a justice of the peace is liable, and the measure of damages would be the loss thereby sustained by the owner. So, where the evidence showed that at the time the justice received the note, and ever since, the makers were wholly insolvent, the plaintiff was entitled to recover nominal damages, and beyond that only the value of the note.

APPEAL from the County Court of Champaign county; the Hon. J. W. LANGLEY, Judge, presiding.

Messrs. SOMERS & WRIGHT, for appellants; that the contract of a surety is to be construed strictly, cited *The People v. Tompkins et al.* 74 Ill. 482.

Mr. S. F. WHITE, for appellee; that it is the duty of justices of the peace to receive money on notes placed in their hands for collection, cited *Rev. Stat. 652, § 104*.

Failing to pay over the same on demand, their sureties are liable: *Rev. Stat. 652, § 104; Huckler v. Shulze et al.* 27 Ill. 40.

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HIGBEE, P. J. This suit was brought by appellee against George L. Pigg, and appellants as his securities on his official bond as justice of the peace.

The evidence shows that Mrs. Laybourn, for whose use this suit is brought, placed in the hands of Pigg, a justice of the peace, for collection, a note dated August 14, 1876, payable to her one year after date, for \$108 and 10 per cent. interest, signed by S. W. Brown and G. R. Shauhan. The note was due when placed in the justice's hands, and instead of collecting it, he transferred it to one White, to whom he was indebted for rent, to be credited on his rent account when collected. After this, in April, 1878, Mrs. Laybourn gave the makers of the note notice not to pay it to White, and demanded the note of Pigg, who refused to surrender it, and thereupon this suit was brought on his official bond.

A judgment was rendered in the court below for \$127.17, the amount of principal and interest then due on the note, from which judgment appellants, the securities on the bond, prosecute an appeal to this Court. The condition of the bond is as follows:

Condition of bond: "The condition of this obligation is such that whereas the said George L. Pigg has been duly elected a justice of the peace in and for the town of Sidney, in the county of Champaign aforesaid. Now, therefore, if the said George L. Pigg shall justly and fairly account for, and pay over all moneys that may come to his hands under any judgment or otherwise by virtue of his office, and shall well and truly perform every act and duty enjoined upon him by the laws of the State to the best of his skill and ability, then this obligation to be void, otherwise to remain in full force and virtue."

The statute provides, Sec. 110, p. 653: "Any justice of the peace failing or refusing to deliver any statute books, dockets or papers to his successor in office, or the person entitled to the same, for the space of ten days after the same are demanded by his qualified successor, or by the person entitled to the same, shall forfeit and pay, etc. * * * And he and his securities on his official bond shall be liable to all persons interested for all damages and losses which may be sustained by reason of such failure or refusal."

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The condition of the bond requires the justice to perform every act and duty enjoined upon him by the laws of this State.

The duty of delivering to the person entitled thereto, all papers in his hands as an officer, upon proper demand therefor, is expressly enjoined by the statute, and his securities are made liable for a failure to perform his duty in this regard.

The only remaining question presented in this case is as to the measure of damages.

The evidence abundantly shows that at the time the justice received the note, and ever since, the makers of the same were wholly insolvent.

Sec. 10, Chap. 79, Rev. Stat. 1874, p. 655, makes the justice and his securities liable for all damages and losses sustained. What damages has the owner of the note sustained? Certainly not the face of the note and interest thereon, for the note had no such value. In cases of the wrongful conversion of the property of another, the true measure of damages is the value of the property at the time of conversion. Where the property sued for in trover is a chose in action, as a bill, note, bond or other security for the payment of money, it seems that the measure of damages is *prima facie* the amount due on the security, the defendant being at liberty to reduce that valuation by evidence showing payment, the insolvency of the maker, or any fact tending to invalidate the security. Sedgwick on the Measure of Damages, 609.

That plaintiff was entitled to recover nominal damages seems clear, but beyond that, the evidence in this case shows she was only entitled to recover the value of the note. This would cover her actual loss by the failure of the justice to perform his duty, and is the limit of her right of recovery against his securities, as fixed by the statute.

The damages found below, upon which judgment was rendered, were excessive, and for this reason the judgment is reversed and the cause remanded.

Reversed and remanded.

C. B. & Q. R. R. Co. v. Farrelly.

CHICAGO, BURLINGTON AND QUINCY RAILROAD
COMPANY

v.

J. THOMAS FARRELLY.

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42	538
3	60
43	77
3	60
45	81
3	60
49	400

1. RAILROADS—KILLING STOCK—CATTLE-GUARDS.—The stock got on the track, near where it was injured, by jumping the cattle-guard from the highway; but it appearing that the railroad company had performed its duty in making the cattle-guard at the public highway, as required by law, and that the same was sufficient to turn ordinary cattle, the company is not liable, unless the injury was caused carelessly or willfully.

2. FENCES—CONDITION AT OTHER PLACES.—The bad condition of appellants' fences at other places than that where the stock got upon the track, could not be shown. The want of a sufficient fence at the place where the animal got upon the track is the precise thing to be considered, and if no fault existed there, no liability attaches.

APPEAL from the Circuit Court of Green county; the Hon. A. G. BURR, Judge, presiding.

Messrs. SWEENEY, JACKSON & WALKER, for appellant; that if the fences and guards were good and sufficient for turning stock under ordinary circumstances, the company is not liable, cited C. & A. R. R. Co. v. Utley, 38 Ill. 410.

The condition of the fence at places other than where the animal got upon the track, cannot be considered: G. W. R. R. Co. v. Hanks, 36 Ill. 241.

Mr. WM. M. WARD and Mr. H. C. WITHERS, for appellee; that where a railway company is liable to expect stock upon its track, it is bound to exercise a greater degree of diligence, and should have trains under control, cited C. & A. R. R. Co. v. Engle, 84 Ill. 397.

Where an animal is seen or could have been seen by the exercise of ordinary care, it is the duty of an engineer to slacken the speed so as to avoid the injury, and a failure to do so will be such negligence as will render the company liable: R. R. I. & St. L. R. R. Co. v. Rafferty, 73 Ill. 58; C. &

A. R. R. Co. v. Ford, Sup. Ct. Ill. unreported; T. P. & W. R'y Co. v. Ingraham, 58 Ill. 120; Ill. Cent. R. R. Co. v. Wren, 43 Ill. 77; T. P. & W. R. R. Co. v. Bray, 57 Ill. 514.

Negligence is a question for the jury: Nor. Line Packet Co. v. Binninger, 70 Ill. 571; Ill. Cent. R. R. Co. v. Benton, 69 Ill. 174.

If a series of instructions properly present the law of the case, it will not be reversed because one may be objectionable: Walker et al. v. Collier et al. 37 Ill. 362; Nor. Line Packet Co. v. Binninger, 70 Ill. 571.

Where there is evidence from which the jury could properly find their verdict, it will not be disturbed: T. W. & W. R. R. Co. v. Moore, 77 Ill. 217.

DAVIS, J. Appellee sued appellant before a justice of the peace to recover the value of a mule claimed to have been killed through the negligence of appellant.

On appeal to the Circuit Court appellee recovered a judgment for \$125, and to reverse this judgment appellant appeals to this Court.

The evidence shows that the mule was on the farm of appellee, and escaped from his pasture on the Saturday night it was injured. His fences were not very good, and his mule got out of his pasture into a neighbor's field, and out of this field into the highway. The mule crossed the cattle-guard from the public highway, jumping over the guard between the rails in the center of the track, and running about forty rods, after jumping the guard, off at one side before getting on the track, and then running about one hundred and twenty rods, when he was knocked off by the locomotive and so badly injured that he was afterwards shot. It was dark when the accident happened, and between six and seven o'clock in the evening. The weight of the evidence is that the cattle-guard was made new about a month before the occurrence, and was at the time in good condition and sufficient to turn ordinary stock.

From this it appears that the mule was on the track of the railroad where it had no right to be when it was struck, and the company having performed its duty in making the cattle

Smith v. Brittenham.

guard at the public highway as required by law, it is not liable unless the appellee has proved against it carelessness or willful injury. *C. & A. R. R. Co. v. Utley*, 38 Ill. 410.

We think the evidence fails to show any carelessness or willful injury on the part of those in charge of the train, and that, therefore, appellant is not liable. Evidence was allowed to be given to the jury against the objection of appellant, to show that the fences approaching the cattle-guard were out of repair, and that there were no fences on the side of the track where the mule was killed.

This evidence was improperly admitted. The mule got upon the track by jumping over the cattle-guard, and it was wholly immaterial what was the condition of the fences approaching the cattle-guard, and the want of fences at the place where the mule was injured. The rule is that the place where the animal gets upon the track is the precise thing to be considered, and if no fault existed there, no liability attaches. *Great Western R. R. Co. v. Hanks*, 36 Ill. 241.

The judgment must be reversed and the cause remanded.

Reversed and remanded.

COLUMBUS C. SMITH

v.

SARAH J. BRITTENHAM.

WRIT OF ASSISTANCE—HOW ISSUED.—Where a writ of assistance becomes necessary to put the complainant in possession of the land to which he is entitled, he should be required to present the facts requiring such writ to the Circuit Court, so that the court may judge of the propriety of awarding it.

ERROR to the Circuit Court of DeWitt county; the Hon. LYMAN LACEY, Judge, presiding.

Messrs. TIPTON & POLLOCK, for plaintiff in error; that a partial failure to perform a contract, although there may be compensation in damages, will not authorize the other party to put

8	62
104	419

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an end to it; cited *Franklin v. Miller*, 4 Adol. & Ell. 599; *Weintz v. Hafner*, 78 Ill. 27.

Fraud gives jurisdiction in chancery only where there is no remedy at law: *Larned v. Holmes*, 49 Miss. 30.

Jurisdiction for damages does not attach in equity except as an incident or auxiliary to some other relief: *Scott v. Bilgerry*, 40 Miss. 119; 2 Story's Eq. Jur. § 794; *Willard's Eq. Jur.* 309.

Fraud will give equity jurisdiction where there is no adequate remedy at law: *Scott v. Bilgerry*, 40 Miss. 119; *Ware v. Houghton*, 41 Miss. 370; *Davis v. Heard*, 44 Miss. 57; *Halls v. Thompson*, 1 S. & M. 443; *Story on Contracts*, § 977; *Story's Eq. Pl.* § 472.

Misrepresentations to obviate a contract of sale of land must relate to a material matter of inducement which misled the other party to his injury: *Slaughters v. Grum*, 13 Wall. 379; *Harding v. Hondley*, 11 Wheat. 103.

Before a party can rescind a contract he must restore the consideration received: *Griffith v. Frederick Co. Bank*, 6 Gill & J. 424; *Martin v. Bordus*, 1 Freem. Ch. 35; *Blen v. Bear River, etc. Mining Co.* 20 Cal. 602; *Kimball v. Cunningham*, 4 Mass. 502; *Conner v. Henderson*, 15 Mass. 319; *Fisher v. Wilson*, 18 Ind. 133; *Cook v. Gillman*, 34 N. H. 557; *Shepard v. Fisher*, 17 Ind. 229; *Shaw v. Barnhart*, 17 Ind. 183; *DeSha's Ex'rs v. Robinson's Ex'rs*, 17 Ark. 228; *Weeks v. Roby*, 42 N. H. 316; *Clarkson v. Mitchel*, 3 E. D. Smith, 269; *Willmanson v. Moor*, 2 Disney, 30; *Getting v. Newell*, 9 Ind. 572; *Garand v. Boling*, 1 Hempst. 710; *Lone v. Latimer*, 41 Ga. 171; *Turner v. Green Clay, etc.* 3 Bibb. 52; *Ellington v. King*, 49 Ill. 449; *Jarrett v. Martin*, 44 Mo. 275; *Johnson v. Martin*, 44 Mo. 275; *Johnson v. Walker*, 25 Ark. 196; *Complin v. Burton*, 2 J. J. Marsh, 216; *Waters v. Lemon*, 4 Ohio, 220; *Wolf v. Dietzsch*, 75 Ill. 210; *Buchanan v. Hornet*, 12 Ill. 338; *Bowen v. Schuler*, 41 Ill. 193; *Ryan v. Brant*, 42 Ill. 78; *King v. Mason*, 42 Ill. 223; *Clark v. Dickson*, El. B. & E. 148; *Hunt v. Silk*, 5 East. 449.

If a vendor sells any part of the goods, he cannot repudiate the sale: *Wolf v. Dietzsch*, 75 Ill. 210; *Chitty on Contracts*,

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351; Story on Sales, § 427; Cox v. Montgomery, 36 Ill. 396.

A party rescinding on the ground of fraud must do so at once upon discovery of the fraud: Thomas v. Barton, 48 N. Y. 193; Flint v. Wood, 9 How. 622; Jennings v. Brighton, 5 DeG. M. & G. 139; Lloyd v. Brewster, 4 Paige, 537; Saratoga & S. R. R. Co. v. Rowe, 24 Wend. 74; Minitum v. Main, 3 Seld. 220; Campbell v. Fleming, 1 Adol. & Ell. 40; Diman v. Providence, etc., R. R. Co. 5 R. I. 130.

A reconveyance should be ordered only upon terms of repayment of purchase money and all sums laid out in improvements, with interest: Harding v. Handy, 11 Wheat. 103; Brooke v. Berry, 2 Gill. 83; Mirely v. Buck, 3 Munf. 232; Tyler v. Black, 13 How. 230; Ellis v. Groves, 5 Dana, 119; Bullock v. Berries, 1 A. K. Marsh, 432; Underwood v. West, 52 Ill. 397; Donovan v. Friclar, 1 Jac. 166; 2 Hilliard on Vendors, 149.

The writ of assistance should be issued by the court: Kenshaw v. Thompson, 4 Johns. Ch. 610; Williams v. Waldo, 3 Scam. 264; Bruce v. Roney, 18 Ill. 67; Frelinghuysen v. Col-den, 4 Paige, 204; Van Hook v. Throckmorton, 8 Paige, 33; Insurance v. Co. Stebbins, 8 Paige, 565; Brush v. Fowler, 36 Ill. 58; Jansen v. Acker, 23 Wend. 480; Jackson v. Warren, 32 Ill. 340; 4 Kent's Com. 184; 1 Lennox Dig. 534.

After a cause is stricken from the docket it cannot be restored without notice to the opposite party: Heywood v. Collins, 60 Ill. 328; Hall v. O'Brien, 4 Scam. 408.

Where there has been long delay in filing a bill, account of rents and profits will be limited to the filing of the bill: Drummond v. Duke of St. Albans, 5 Ves. 433; Pickett v. Loggin, 14 Ves. 433; Kerr on Fraud and Mistake, 348.

Messrs. LODGE & WELDON, for defendant in error; that the default in this case admitted all the facts properly charged in the bill, cited Mansfield v. Hoagland, 46 Ill. 539.

Upon a bill taken *pro confesso* it cannot be objected that the facts do not warrant the relief granted: Boslin v. Nichols, 47 Ill. 353.

Defendant is not guilty of *laches*: Cox v. Montgomery, 36 Ill. 396; 2 Story's Eq. 695.

Smith v. Bingman.

Compensation need not be tendered before filing the bill: *Bryant v. Brant*, 42 Ill. 75.

Unless exceptions are taken to the master's report, they cannot be urged on appeal: *Rygar v. McNeal*, 38 Ill. 401.

PER CURIAM. We find no error in the record of this case, except in that portion of the decree rendered by the court below, in which it provides that the possession of the premises in controversy be surrendered to appellee within thirty days, and upon failure or refusal, that the clerk of the court issue the usual writ of assistance, under the seal of the court, to the sheriff to put appellee in possession of the lands. The authority to the clerk to issue the writ of assistance could not be conferred by the court in the manner attempted by the decree. In *Bruce v. Roney et al.* 18 Ill. 74, it was held, "should a writ of assistance become necessary to put the complainant in possession of the interest in the land to which he is entitled, he should be required to present the facts requiring the assistance to the circuit court; so that the court itself may judge of the propriety of awarding the writ."

The decree of the circuit court must be reversed and the cause remanded, with directions to that court to proceed with the execution of said decree in accordance with this opinion.

Reversed and remanded.

ISAAC SMITH
v.
RACHAEL BINGMAN.

VERDICT AGAINST EVIDENCE.—The court being of opinion, from an examination of the record, that the verdict was not warranted by the evidence, reverse the judgment.

APPEAL from the County Court of Cass county; the Hon. J. W. SAVAGE, Judge, presiding.

Messrs. WHITNEY & TINNEY, for appellant.

Smith v. Bingman.

Mr. OSCAR A. DELEUW, for appellee; that a verdict should not be set aside except where the preponderance is clearly against it, cited *Pafineau v. Belgarde*, 81 Ill. 61.

PER CURIAM. This was a suit brought in the County Court of Cass county, by appellees against appellant, in *assumpsit*.

The only count in the declaration is for money had and received, to which appellant pleaded *non assumpsit* and Statute of Limitations. Plaintiff below filed with her declaration the following account:

"Isaac Smith to Rachael Bingman, Dr. To amount collected by you on the interest of plaintiff in lands conveyed by you to Walker, in Sangamon county, \$800.00."

The trial resulted in a verdict and judgment against appellant for \$600, and he brings the case here, and assigns for error that the evidence does not sustain the judgment.

We have examined the evidence in the record carefully, and do not find any proof that appellant ever sold any land in which appellee had any interest to Walker, or that he ever received any money from Walker belonging to her. The record discloses some admission of indebtedness by appellant to appellee; but without further explanation they are not sufficient to warrant the verdict and judgment. We purposely refrain from discussing the evidence in detail, as the case must again be submitted to a jury, but upon the whole evidence we think the error well assigned.

We cannot refrain from expressing our disapproval of the criticisms upon the county judge who tried the case, injected into the brief of appellant. The judge is not before this court, and has no opportunity to defend himself against unjust reflections upon him. Under such circumstances it is ungenerous and highly improper for counsel to indulge in reflections uncalled for, and not warranted by anything in the record.

We also disapprove of the insinuations in the brief of appellee against the professional conduct of the attorney of appellant. Briefs should be respectful to the court, the parties, and all persons named in them; and this court will, as far as it has power, see that this rule is enforced.

Judgment reversed and cause remanded.

Reversed and remanded.

WALTER P. DWIGHT

v.

LORING P. CHASE.

1. **FRAUDULENT MISREPRESENTATIONS—KNOWLEDGE.**—It is the well settled doctrine in this State that there must be knowledge of the falsity of the statement to render it fraudulent.

2. **PLEADING—ALLEGATIONS.**—The declaration alleged that the defendant falsely, fraudulently and deceitfully represented to the plaintiff that said business yielded \$2,000 per annum, and was and had been worth that much, etc., and there was an allegation that the said business was entirely worthless. This was not a sufficient traverse of the specific charges of fraud contained in the count. The denial must be by express contradiction in the terms of the allegation traversed.

3. **STATEMENTS AS TO VALUE—WHEN THEY BECOME MATERIAL.**—While it is the general doctrine that a mere statement as to the value of property, or as to its quality, are not evidence of legal fraud sufficient to justify a recovery on that ground, the representation by defendant that his said business as a real estate and loan broker was large and profitable, and that his income therefrom was worth and yielded \$3,000 per annum, admitted by the demurrer to have been falsely and fraudulently made to deceive the plaintiff, and to have been wholly untrue, was not the mere expression of an opinion about the value of property. It was the false assertion of the existence of a material fact, a fact intangible in its nature, and the truth of which was peculiarly within the knowledge of defendant, and by it plaintiff was deceived and induced to part with his money.

APPEAL from the Circuit Court of McLean county; the Hon. OWEN T. REEVES, Judge, presiding.

Mr. NEWTON B. REED, for appellant.

Messrs. BLOOMFIELD & HUGHES, for appellee; argued that no action lies against a vendor for false statements in regard to the value or good qualities of the property, and cited *Nœtling v. Wright*, 72 Ill. 390; *Hemmer v. Cooper*, 8 Allen, 334; *Manning v. Albee*, 11 Allen, 520; *Saunders v. Hatterman*, 2 Ired. 32; *Cooper v. Lovering*, 106 Mass. 79; *Banta v. Palmer*, 47 Ill. 99; *Merwin v. Arbuckle*, 81 Ill. 501; *Miller v. Craig*, 36 Ill. 109.

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HIGBEE, P. J. The declaration in this case contains two counts. The first count is as follows: For that, whereas, heretofore, to wit: On the first day of December, A. D. 1876, the said defendant was a real estate agent and broker in Chicago, Illinois; and the plaintiff for a long time, to wit: four years prior to the committing of the grievances as hereinafter mentioned, was a resident of Detroit, Michigan, and at the time said grievances were committed, was, to wit, twenty-one years of age. And prior to November, 1871, plaintiff had resided in Chicago, Illinois, where plaintiff was intimately acquainted with defendant, who, at the time, or a short time prior thereto, was the superintendent of Plymouth Church Sunday-school; and as such friend and Sunday-school officer, the said defendant won the confidence of plaintiff, and when the plaintiff returned to Chicago, as aforesaid, after an absence of, to wit, four years, he supposed said defendant was an honest, truthful and reliable man, as he had prior to that time supposed him to be. But at the time aforesaid, to wit: December 1st, 1876, the said defendant falsely and fraudulently represented to the plaintiff that he, the defendant, was doing a large and prosperous business as a real estate and loan broker, in Chicago, Illinois, and being desirous of disposing of one-half of his interest in said business, and the good will thereof, at, to wit, the time and place aforesaid, wrongfully and injuriously contriving and intending to deceive, defraud and injure the said plaintiff in this behalf, then and there falsely, fraudulently and deceitfully represented and asserted to the plaintiff that said defendant's income from his said business, was large and profitable, and yielded an income over and above all expenses of, to wit, \$3,000 per annum; and that he, the defendant, had at said time, a large and profitable business, and the defendant's good will in said one-half interest in said business was easily worth \$3,000. And the said defendant, at the time aforesaid, further fraudulently and deceitfully represented to the plaintiff, with intent to injure, deceive and defraud him, that said defendant was the owner of lots twenty-two and twenty-three, block eighteen, in Irving Park, Cook county, Illinois, and that the said defendant at the time and place aforesaid,

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agreed with plaintiff that he, said defendant, would convey said lots to plaintiff if plaintiff would buy the said one-half interest in the said real estate business, and the good will thereof, for the said sum of \$3,000. And said defendant, with intent to injure, defraud and deceive plaintiff, falsely, fraudulently and deceitfully represented to plaintiff that said lots were worth as much as \$3,000, and could easily be sold for that sum at, etc., aforesaid; and the said plaintiff, confiding as aforesaid, in the said representations and assertions of the said defendant, at the special instance and request of the said defendant, bargained with him to buy of him one-half of the said defendant's interest in the said real estate business, and his good will in the same, for a certain sum, to wit: the sum of \$3,000; and the said defendant, by then and there falsely, fraudulently and deceitfully pretending and representing to the said plaintiff that the said false, fraudulent and deceitful representations were true, then and there sold the said one-half interest in said business, and the good will thereof, to the said plaintiff, at and for the said sum of money, to wit: \$3,000; and the plaintiff afterwards, to wit: on the day and year last aforesaid, paid the defendant the said sum of money for the same; whereas, in fact, the said defendant's one-half interest, and the said defendant's good will therein, have not, nor had they been, worth as much as one cent; but, on the contrary, were entirely worthless, and the said defendant did not own said lots, nor did he convey the same or any other lots to plaintiff, nor were said lots at that time worth \$3,000; but, on the contrary, were not worth over \$500, as the defendant well knew at the time he made his said false and deceitful representations. And the said plaintiff further says, that the said defendant, by means of the promises at the time and place aforesaid, falsely and fraudulently deceived the said plaintiff in the said sale, and the said business was and still is worthless and of no value to the plaintiff; and wherefore the plaintiff hath suffered great trouble and damages, to the amount of \$6,000, and therefore he brings this suit, etc."

To this declaration, and each count thereof, a general demurrer was filed, and sustained by the court below.

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Plaintiff brings the case here by appeal, and assigns for error the decision of the court below in sustaining the demurrer to each count of his declaration.

The material allegations in the second count are that the defendant falsely, fraudulently and deceitfully represented to plaintiff that the income from the said business yielded \$2,000 per annum, and was and had been worth that much, and that a half interest and the good will of the same was worth \$3,000.

The general allegation that "the said business was entirely worthless," is not a sufficient traverse of the specific charges of fraud in the count.

The denial must be by express contradiction in terms of the allegation traversed. *Stephen* Pl. 154; 2 *Chitty* Pl. 688. The demurrer was properly sustained to this count. The only remaining question is as to the sufficiency of the first count. This count is copied from 2 *Chitty's* Pl. p. 688, and was adopted and sustained in *Dobell v. Stephens*, 3 B. & C. 623.

In *Paisley v. Freeman*, 3 T. R. § 1, Justice Buller says: "That fraud without damage, or damage without fraud, gives no cause of action, but where these two concur an action lies;" and that "if a man will wickedly assert that which he knows to be false, and thereby draw his neighbor into a heavy loss, the law should compel him to pay for it."

This language was quoted approvingly by the court in *Benton v. Pratt*, 2 Wend. 368, and in *Upton v. Vail*, 6 Johnson, 181. Kent, C. J., quotes *Paisley v. Freeman* as standing upon the clearest principles of jurisprudence, and adds: "But independent of the English cases, I place my opinion upon the broad doctrine that fraud and damage coupled together will sustain an action." These cases are cited and approved by Mr. Justice Breese, in *Weatherford v. Fishback*, 3 Scam. 170.

In *Culver v. Avery*, 7 Wend. 380, the same doctrine was held, and that there was no distinction whether the false representations relate to real or personal property; and in *Monell & Weller v. Colden*, 13 Johnson, 396, a recovery was had in case for fraudulent representations on sale of land, that a certain privilege was connected with it.

In *Medbury et al. v. Watson*, 7 Metc. (Mass.) p. —, the case

of *Paisly v. Freeman*, is quoted and approved by the court in the following language: "This case though much contested, and though often attempted to be shaken, has received the sanction of successive decisions in Westminster Hall and in the courts of different States in this country."

It is true that the municipal law does not apply the rule of the moral law, that we should do unto others as we would that they should do unto us, to commercial transactions, nor does it lay down any certain definitions of fraud to apply in all cases.

But while it tolerates a certain amount of selfish cunning, it will not permit it to be carried to the extent of justifying one in wickedly and knowingly making false and fraudulent representations about material facts to deceive the unwary to their damage.

It is admitted by the demurrer in this case that the defendant, with intent to defraud and deceive plaintiff, falsely, fraudulently and deceitfully represented and asserted to him that the income from his said business was worth and yielded \$3,000 per annum, clear of all expenses, and that the one-half interest was worth \$3,000; and that the plaintiff confiding in these representations, was thereby induced to purchase the one half interest in his said business and pay \$3,000 therefor; whereas, in fact, the said business was not, nor had it been worth as much as one cent, as defendant well knew when he made said representations.

Here is a case where the willful fraud of the defendant results in damage to the plaintiff. But it is urged by defendant's attorneys that there can be no recovery, because the representations were of the value of the property to be sold, and that even if false, no action can be maintained therefor; and numerous authorities are cited to sustain this position.

We admit the doctrine to be well settled that the mere statement of the vendor as to the value of property, real or personal, or as to its qualities, or what he paid for it, or has been offered for it, are not evidence of legal fraud to justify a recovery. One of the reasons given for it is, that it is mere matter of opinion only, about which persons may well differ.

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Another reason given is, the difficulty of proving a mere statement of opinion to be false, for no one can know what another thinks with any certainty, unless the opinion is of some tangible matter of fact plainly before one's eyes, and then it would generally be falsehood as to fact. 2 Parsons on Contracts, 778.

Again, in the sale of real or personal property, the vendor has the right to exalt the value of his own property and depreciate that of the purchaser, and when the purchaser has it in his power to examine the property, he must ordinarily do so, and judge of its value for himself; and in all such cases, in the absence of a fraud, the rule of *caveat emptor* applies. These rules, however, are not applicable to this case. This was not the purchase of tangible property which could be inspected by the plaintiff. It was the purchase of one-half of the defendant's business as a real estate and loan agent.

As determining the value of the business, it was material for him to know what the yearly income from it had been and was then. This important fact was peculiarly within the knowledge of the defendant. He alone could give correct information upon the subject, and the plaintiff was not guilty of negligence in relying upon his representations upon the subject. *Lyney v. Selby*, 2 Ld. R. 1118, was an action on the case to recover for deceit. Defendant had sold to plaintiff a lease, and pending the treaty he falsely and fraudulently represented to the plaintiff that the premises were demised at the yearly rent of 68*l.*, to which representation plaintiff gave credit and purchased for 105*l.*; whereas, the premises were in fact demised at a yearly rent of only 52*l.* 10*s.* Holt, C. J. said: "If the vendor gives in a particular of the rents, and the vendee says he will trust him and inquire no farther, but rely on his particular, then if the particular be false, an action will lie."

Gould, Justice, said the "value of the rents was a thing hard to be known, and in secret known to none but the landlord and the tenants, and they might be in confederacy together." Plaintiff recovered his damages.

In *Dobell v. Stephens*, 3 B. & C. 623, the facts were that the defendant kept a public house, and was possessed of a lease of the house for a term of years, and the plaintiff being in treaty

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with the defendant to purchase his interest in the house, the defendant falsely represented to plaintiff that the receipts for the spirits sold in the house had been and then amounted to the sum of 160*l.* per month; that the quantity of porter sold in the house amounted to seven butts per month; that two rooms in the house rented for 27*l.* per annum, etc., by means of which false representations plaintiff was induced to buy, etc. The declaration then averred that each of the particular statements were false, etc. The court held the action well brought, and plaintiff recovered his damages.

This case is quoted and approved by the Supreme Court of Indiana, in *Shaeffer v. Sleade et al.* 7 Black. 178, where it is said by the court: "At law an action may be maintained for false representations made by a vendor to a purchaser of matters within the peculiar knowledge of the vendor, whereby the purchaser is injured."

The case of *Bowing et al. Stephens*, 2 C. & P. 337, was an action on the case against defendant for falsely and fraudulently representing that a certain public house sold by him to plaintiff was doing a business of 300*l.* a month. Plaintiff recovered his damages. In the ensuing Michaelmas term, a new trial was asked for and refused.

In *Hutchinson v. Morley*, 7 Scott, 341, it was held, that "a contract for the sale of a public house is avoided by a false representation by the vendor as to the amount of the business attached to the house, though the agreement expressly excludes good will." Fraudulent misrepresentations of particulars in relation to the estate, which the buyer has not equal means of knowing, and where he is induced to forbear inquiries that he otherwise would have made, are not to be viewed in the light of assertion *gratis dicta*; and therefore, where damage ensues, the party guilty of the fraud will be liable for the injury sustained. *Medbury v. Watson*, 7 Metc. *supra*. Kerr, in his work on the law of Frauds and Mistakes, p. 85, says:

"The difference between a false averment in matter of fact, and a like falsehood in matter of judgment, opinion and estimate, is well illustrated by familiar cases in the books. If the owner of an estate affirm that it will let or sell for a given sum,

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when, in fact, such sum cannot be obtained for it, it is, in its own nature, a matter of judgment and estimate, and so the parties must have considered it. But if an owner falsely affirm that an estate is let for a certain sum, when it is, in fact, let for a smaller sum, or that the profits of a business are more than, in fact, they are, and thereby induces a purchaser to give a higher price for the property, it is fraud, because the matter is within the private knowledge of the owner."

The distinction between mere expressions of opinion and false affirmations of material facts, is well taken by Justice Breese, in the case of *White et al. v. Sutherland*, 64 Ill. 187. It was a bill to foreclose a mortgage. The defense was that the land was purchased by appellant on the faith of representations made as to material facts, and relied upon by defendant, etc. The learned justice says: "Appellant's counsel claim that the misrepresentations complained of were merely expressions of opinion, on which it was the folly of appellant to rely. He should have examined for himself, and authorities are cited in support of this proposition, which we are not disposed to question. But were they mere expressions of opinion? For this is the turning point of the case.

"Was it the expression of an opinion merely, that twenty dollars per acre was the selling price of similar lands in that locality? The proof is overwhelming that it did not exceed ten dollars per acre. Was it mere opinion that the fence around forty acres was a good fence, sufficient to turn stock? Was it mere opinion there were rails enough to fence another forty acres? Was it mere opinion there was timber enough on the land to fence the entire tract? No! these were not expressions of opinion, but deliberate statements of facts. They were false statements, known to be so by the party making them, and made to induce an act which would not have been done in the absence of such statements."

With equal propriety we may ask in this case: Was it mere opinion that the income from defendant's business, as a real estate and loan broker, was worth and yielding \$3,000 per annum clear of all expenses? The income derived from the business was the controlling fact to induce plaintiff to make

the purchase. It was a fact peculiarly within the knowledge of defendant, and when applied to by plaintiff for information, he admits, by his demurrer, that he knowingly and purposely deceived him by false representations, and thereby obtained his money, which he could not otherwise have gotten.

But we are referred by defendant's counsel to the case of *Noetting v. Wright*, 72 Ill. 390, as decisive of this case.

We think that a careful examination of that case will show that this opinion is not in conflict with what is there decided.

That case was an action on the case, to recover damages for deceit and misrepresentation on the sale of certain real estate and drugs, and the practice and good will of a physician.

The declaration contained six counts, to each of which a demurrer was sustained, and the question presented to the Supreme Court was as to the sufficiency of the declaration.

It was alleged in the first count, that the defendant made a false representation of the value of his property, practice and good will as a physician; that plaintiff relying on the representations, was induced to purchase the property and practice, and they were worth much less than represented.

In the second count, misrepresentation in the value of the real estate sold as charged. In the third count, a sale of property of the value of \$500 and the practice and good will of a physician are alleged to have been sold for \$2,500; that the defendant represented his practice as worth from \$3,500 to \$6,000 per annum; that these representations were relied upon and were false; that the good will and practice were of no value.

The court, in an opinion by the present chief justice, held these counts bad, and said: "Statements made by a vendor of property, as to its value, or the price he has been offered for it, or the good qualities of the property, are of daily occurrence in the sale and transfer of real and personal property in all commercial countries, and yet it has never occurred to any respectable law writer that if such statement should prove to be false, an action for deceit could be maintained."

"Statements of this character do not relieve the purchaser from the responsibility of investigation into the true condition

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or value of the property. Such statements are only regarded as *gratis dicta*. These counts simply allege that the representations were false, and that the plaintiff relied upon them, and was deceived. This has never been held to be sufficient to support an action. There is no allegation that the representations were made with fraudulent intent to deceive, or that the party making them knew them to be false, and for aught that appears he may have made them in the utmost good faith, believing them to be true at the time."

It is the well settled doctrine of the Supreme Court of this State, that there must be knowledge of the falsity of the statement, to render it fraudulent. *Tone v. Wilson et al.* 81 Ill. 529, and cases there cited.

That such was the view of the court, will more fully appear when we consider what is said in reference to the next count.

The fourth count alleges the representations as to the value of the property, practice and good will sold to have been false, and fraudulently made, with the intent to deceive the plaintiff, etc.; that plaintiff relying upon the representations, purchased, etc.

It also avers that defendant agreed to relinquish his practice in the neighborhood as a physician; but that he violated his agreement and resumed practice, etc., and claims damages for the deceit practiced upon him, and for the violation of the contract to refrain from practice.

It was held that two causes of action were blended in the same count, and the demurrer properly sustained to it for that reason.

The real question presented in this record was not presented in the case of *Noetling v. Wright*, and therefore not passed upon by the court.

The representation by defendant that his said business as a real estate and loan broker was large and profitable, and that his income therefrom was worth and yielded \$3,000 per annum, admitted by the demurrer to have been falsely and fraudulently made, to deceive the plaintiff, and to have been wholly untrue, was not the mere expression of an opinion about the value of property. It was the false assertion of the existence of a material fact, a fact intangible in its nature, and the truth of which

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was peculiarly within the knowledge of the defendant, and by it plaintiff was deceived and induced to part with his money.

We think the court below erred in sustaining the demurrer to the first count of plaintiff's declaration, and for that reason the judgment is reversed and the cause remanded, with leave to plaintiff to amend the second count of his declaration.

Reversed and remanded.

THOMAS A. MCINTYRE ET AL.

v.

TRUSTEES OF SCHOOLS, etc.

OFFICIAL BOND—LIABILITY OF SURETIES—DEFICIT OCCURRING PRIOR TO EXECUTION OF BOND.—The liability of a surety is not to be extended by implication beyond the terms of his contract. The undertaking of a surety upon the official bond of township treasurer, is that the principal shall pay over to his successor all moneys in his hands as such treasurer during his term of office, but his sureties are not liable for his wrongful acts prior to the execution of the bond.

ERROR to the Circuit Court of Greene county; the Hon. A. G. BURR, Judge, presiding.

Mr. JAMES R. WARD, for plaintiffs in error; that the bond cannot be construed to cover past delinquencies, cited Ladd et al. v. Board of Trustees, 80 Ill. 233; Farrar v. United States, 5 Pet. 389; United States v. Boyd, 15 Pet. 209; Trustees, etc. v. Otis et al. Sup. Ct. Ill. 1877, unreported.

The contract of a surety is to be construed strictly: People v. Tompkins et al. 74 Ill. 482; Governor v. Lagow, 43 Ill. 134.

It is only for defaults occurring during the term for which the bond was given, that the sureties are liable: Vivian v. Otis et al. 24 Wis. 518; Farrar v. United States, 5 Pet. 389; United States v. Boyd, 15 Pet. 209; Miller et al v. Macoupin Co. 2 Gilm. 50; Rochester v. Randall, 105 Mass. 295; United States v. Eckfords, 1 How. 261; Meyers v. United States, 1 McLean, 493; 2 Barb. Ch. 613.

McIntyre et al. v. Trustees.

MR. J. W. ENGLISH, for defendants in error; that the treasurer is required by law to keep books of account, and they are public records, and presumed to show correctly the financial account of the treasurer, cited Rev. Stat. 1877, 911, § 56.

They are equivalent to an official report of the funds in the hands of the treasurer at the beginning of his term of office: *Morley v. Town of Metamora*, 78 Ill. 394.

The sureties on his last official bond are chargeable with notice of all the treasurer's books contain: *Pinkstaff et al. v. The People*, 59 Ill. 148; *Miller et al. v. Macoupin Co.* 2 Gilm. 50.

HIGBEE, P. J. This action is against McIntyre and his sureties upon his official bond as treasurer of said school township, to recover money which it is alleged he had in his hands at the expiration of his term of office, and failed to pay over to his successor on demand made therefor.

The condition of the bond upon which the breach is assigned is in the form required by the statute, and is that if the said McIntyre shall deliver to his successors in office all moneys, books, papers, securities and property in his hands, as such treasurer, then the obligation to be void.

The case was submitted for trial in the court below upon the following agreed facts: That Thomas A. McIntyre had been Treasurer of Township 9, R. 12, from April, 1869, to April 8th, 1878, the date of his removal from office. He was annually re-appointed treasurer of said township, from April, 1873, to April, 1877, and each time gave a new bond with new sureties. The record of the proceeding showing his last appointment is as follows: "April 2nd, 1877, at a regular meeting, notes and bonds in treasurer's hands examined and found correct, and Thomas A. McIntyre is hereby appointed treasurer for another year, and bond approved. A. F. Herron, Pres't." The bond sued on was given in April, 1877, for the succeeding year. McIntyre never made any written report of his receipts and expenditures that was recorded or filed, from his first appointment, in 1869, till his removal, April 8th, 1877. He had \$21.28 township moneys in his hands on the day of his reap-

pointment in 1877. That from thence to April 8th, 1878, his deficit is \$383.24. He is in default \$3,833.53, altogether; moneys received and not accounted for from 1869 to 1878 (April), \$3,450.31, of which was unlawfully appropriated and converted by McIntyre to his own use prior to March 30th, 1877. The foregoing statement as to moneys actually received and expended by McIntyre during his last term of office, and conversion by him prior thereto, being McIntyre's own showing from his private papers, there being no public record to show these facts, or that they were known to the trustees or McIntyre's sureties until after his removal from office.

Upon this evidence the court rendered judgment against the defendants for \$3,833.53 and costs.

From the agreement of parties it appears that when the bond sued on was given, the principal had in his hand belonging to the school fund \$21.28, and that his deficit during the remainder of his term of office only amounted to \$383.24. This presents the question, whether his sureties are liable for the \$3,450.31 which it is admitted had been wrongfully converted by the principal to his own use before the commencement of his term of office for which they undertook to be responsible for his official acts.

The liability of a surety is not to be extended by implication beyond the terms of his contract. The undertaking here is that the principal shall pay over to his successor all moneys, etc. in his hands as such treasurer, and his sureties are not liable for past derelictions. *Ladd v. Trustees*, 80 Ill. 234; *Farrar v. U. S.* 5 Peters, 389; *U. S. v. Boyd*, 15 Peters, 209; *Vivian v. Otis et al.* 24 Wis. 518; 1 American Reports, 199; *Rochester v. Randall*, 105 Mass. 295; *Trustees of Schools v. Wm. M. Smith et al.* 88 Ill. 181; *McLean v. People*, 85 Ill. 205.

The sureties are liable for all moneys received by their principal or in his hands during his term of office, but not for his wrongful acts before they became responsible for his official conduct by signing his bond. It is obvious from the agreement that the \$3,450.31 was never in the hands of McIntyre while acting under this bond; its misappropriation was complete before the bond was executed, and while he was acting under a bond signed by other parties.

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This case is clearly distinguishable from the case of *Morley v. Town of Metamora*, 78 Ill. 396. There a supervisor was elected for a second term, and at the end of the first term made a report, showing a certain amount in his hands belonging to the town, which report was approved, and it was held that such report must be considered as true, and that such amount was in his hands as his own successor, and that the sureties on his bond for the second term were liable for a failure on his part to account for it.

Here no account was rendered by the school treasurer, and it is admitted that when he was appointed in April, 1877, he had in his hands but \$21.28, and that he had prior to that time wrongfully appropriated and converted to his own use \$3,450.31, and that he has rendered no account of the same.

When an officer is his own successor, and receives money during his first term, in the absence of proof to the contrary, it may well be presumed that he still holds it during his second term, but such a presumption may be rebutted, and in this case is clearly rebutted by the admitted facts in the record.

It being admitted that the money sought to be recovered was not at any time in the hands of the defendant, McIntyre, during his last term of office, we think his sureties on his official bond are not liable for his failure to pay it over to his successor, and therefore reverse the judgment of the court below and remand the cause.

Reversed and remanded.

ABRAHAM R. GREGORY

v.

GEORGE W. SPENCER

PRACTICE—BILL OF EXCEPTIONS—WHAT MUST APPEAR IN.—The motion for new trial and affidavits upon which it is based, as well as instructions complained of, should be preserved in a bill of exceptions, or this court will not review the action of the court below. The affidavit and instructions copied into the record by the clerk form no part of the record.

Gregory v. Spencer.

APPEAL from the County Court of Morgan county; the Hon. E. P. KIRBY, Judge presiding.

Mr. E. M. SANFORD, for appellant; that the court erred in permitting the case to go to trial without issue being joined or waived, to appellant's replication; cited Chitty's Pl. 499; Adams et al. v. Neely, 15 Ill. 380.

Under defendant's second plea, which was denied by plaintiff's replication, the burden of proof was upon the defendant: 1 Archbold's Nisi Prius, 207.

Messrs BROWN & RUSSELL, for appellee; that exceptions to a motion for new trial must be preserved by bill of exceptions, cited Horn v. Eckert, 63 Ill. 522; St. L. A. & T. H. R. R. Co. v. Dorsey, 68 Ill. 326; Hay v. Hayes, 56 Ill. 342; Snell v. Trustees etc. 58 Ill. 290; Gaddy v. McClean, 59 Ill. 182; Thompson v. White, 64 Ill. 314; Drew v. Beall, 62 Ill. 164.

Being copied by the clerk into the transcript does not make them a part of the record: Drew v. Beall, 62 Ill. 164; Grimes v. Butts, 65 Ill. 347; Saunders v. McCollins, 4 Scam. 419; Corey v. Russel, 3 Gilm. 367; Petty v. Scott, 5 Gilm. 209; Magher v. Howe, 12 Ill. 379; Moss v. Flint, 13 Ill. 570; Smith v. Wilson, 26 Ill. 186; Ballance v. Leonard, 37 Ill. 43; Gill v. People, 42 Ill. 321; Hartford Fire Ins. Co. v. Vanduzor, 49 Ill. 489.

In the absence of a bill of exceptions showing all the evidence, the court will presume there was sufficient evidence to support the judgment: Wilson v. McDowell, 65 Ill. 522; Brown v. Clement, 68 Ill. 192.

Going to trial without rejoinder to replication, it will be considered as waived: Granger v. Warrington, 3 Gilm. 299; McCully v. Silverburg, 18 Ill. 306; Stumps v. Kelly, 22 Ill. 140; Hazen v. Pierson et al. 83 Ill. 241; Robinson v. Brown, 82 Ill. 279.

Where a plea concludes to the country it is merely matter of form to add the *similiter*, and it is not error to proceed to trial without it: Stumps v. Kelley, 22 Ill. 140; Evans v. St. John,

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9 Porter, 186; Swan v. Ray, 2 Blackf. 291; Tomplin v. Krallin, 3 Ind. 373; Hazen v. Pierson et al. 83 Ill. 241.

PER CURIAM. This was a suit brought to recover upon a promissory note, given by appellee to appellant for \$225, in May, 1876.

The cause was pending in the County Court for trial; plea of general issue and plea of payment were filed.

It appears that in the absence of plaintiff in error, the cause was submitted to a jury and tried, resulting in a verdict against appellant.

Appellant entered a motion in the court below for new trial; the court overruled the motion and entered judgment against plaintiff for costs. This action of the court, and the giving certain instructions on part of appellee, are assigned for error.

Upon examination of the record we find no bill of exceptions containing the affidavit on which such motion was based, and no instructions. We cannot, therefore, review the action of the court below. The affidavit and instructions copied into the record by the clerk, are no part of the record; they should have been preserved in a bill of exceptions. Horn v. Eckert, 63 Ill. 522.

We therefore affirm the judgment of the court below.

Affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—FEBRUARY TERM, 1878.

EDWARD RUTZ

V.

THE ESLER AND ROPIEQUET MFG CO.

1. INCORPORATION—ESTOPPEL.—A subscriber to the capital stock of an incorporated company, when he participates in its organization and acts as a director, is estopped from showing that the company failed to comply with the law in its organization.

2. SUBSCRIPTION TO STOCK—FRAUDULENT REPRESENTATIONS.—Where a corporation sends out agents to procure subscriptions to its stock, and such subscriptions are obtained by fraudulent representations, the fraud may be set up in bar of a recovery on a suit for such subscriptions; but where subscriptions are procured by commissioners prior to the organization of the company, their fraudulent representations made to induce subscriptions, constitute no defense to a suit by the company for such subscriptions. They are not the agents of the company.

3. RELEASE OF SUBSCRIPTION TO CERTAIN STOCKHOLDERS.—A release of all or a portion of the amount subscribed by some of the subscribers, releases all the subscribers who do not assent to that release, or in some way give their sanction to it. Such release destroys the equality that exists between subscribers according to their subscriptions, which is the very essence of the contract.

APPEAL from the Circuit Court of St. Clair county; the Hon.
WM. H. SNYDER, Judge, presiding.

Rutz v. The Esler and Ropiequet Mfg. Co.

MR. R. A. HALBERT, MR. F. A. MCCONAUGHY and Messrs. WILDERMAN & HAMILL, for appellant; that it was error to give verdict and judgment for an amount greater than that claimed in the declaration, cited *Stephens v. Sweeney*, 2 Gilm. 375; *Brown v. Smith*, 24 Ill. 198; *Walcott v. Holcomb*, 24 Ill. 331; *Rines v. Kumler*, 27 Ill. 291; *Altes v. Hinckler*, 36 Ill. 266.

The capital stock not having been fully subscribed, no legal organization could be effected, and the call was made by persons unauthorized to make it: *Rev. Stat. 1874*, 286; *G. G. N. Q. M. C. v. McLister*, 15 Eng. Rep. (Moak) 1; *Bigelow v. Gregory et al.* 73 Ill. 197.

Appellant's subscription was induced by fraud, and this can be set up as a defense; *Bwlch-Plwm Lead Co. v. Baynes*, 2 Law Rep. 324; *McCreight v. Stevens*, 1 H. & C. 454; *Glamorgan-shire Co. v. Irvine*, 4 F. & F. 947; *Henderson v. Railway Co.* 17 Tex. 560; *Peek v. Gurney*, 1 Eng. Rep. (Moak) 567; *Upton v. Triplecock*, 1 Otto, 53; *Miller v. Barber*, 66 N. Y. 558; *Burrows v. Smith*, 6 Seld. 550; *Neil v. Cummings*, 75 Ill. 170; *Blalock v. Randall*, 76 Ill. 224; *Thomas v. Coultas et ux.* 76 Ill. 493; *Angell & Ames on Corporations*, § 531; 1 *Redfield on Railways*, 159; *Brice on Ultra Vires*, 152; *Allen v. Hart*, 72 Ill. 104; *Case v. Ayers*, 65 Ill. 142; *Williams v. Franklin, etc., Asso.* 26 Ind. 315; *Brookville Lumber Co. v. McCarty*, 8 Ind. 392; *Hubbard v. Chappel*, 14 Ind. 601; *Evert v. C. & A. Lumber Co.* 19 Ind. 242.

A release of certain of the subscribers from a portion of their subscription, releases all: *County of Crawford v. Pittsburg R. R. Co.* 32 Pa. St. 141; *New York Ex. Co. v. DeWolf*, 31 N. Y. 282; *Angell & Ames on Corporations*, § 531; *McConaty v. Cent. Lum. Co.* 1 Penn. 426.

MR. C. W. THOMAS, for appellee; that the remittitur by appellee cured the objection that verdict and judgment were greater than claimed in the declaration, cited *Rev. Stat., chap. 110*, § 82.

The appellant is estopped to deny the legal organization of the corporation: *Herman on Estoppel*, § 569; *Wight v. Shelby R. R. Co.* 16 B. Mon. 7; *Central Plank Road Co. v. Clemens*,

16 Mo. 359; *Stone v. Great Western Oil Co.* 41 Ill. 85; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464; *Lane v. Brainerd*, 30 Conn. 577; *Crump v. U. S. Mining Co.* 7 Gratt. 352; *Southern P. R. R. Co. v. Hixon*, 5 Ind. 166; *Northern Mo. R. R. Co. v. Winkler*, 33 Mo. 354; *Smith v. Heidecker*, 39 Mo. 157.

The fact that the directors who make the call are not legally elected is no defense to this action: *Eakright v. Logansport R. R. Co.* 13 Ind. 404; *O. & M. R. R. Co. v. McPherson*, 35 Mo. 13; *Johnson v. Crawfordsville, etc. R. R. Co.* 11 Ind. 280.

A corporation has power to enforce a contract for subscription, though it might not maintain its corporate existence if attacked in a direct proceeding: *Buffalo & Albany R. R. Co. v. Cary*, 26 N. Y. 75; *Swartout v. M. C. R. R. Co.* 24 Mich. 389.

No representations made by the commissioners as to what the proposed company would do, would be binding upon the company after it was organized: *Cabey v. R. R. Co.* Sup. Ct. Penn. 1876; *Wharton on Contracts*, § 1068.

ALLEN, J. To the April term of the St. Clair Circuit Court suit was brought by appellee against appellant for the recovery of \$2,250, on a call of subscription to capital stock to appellee by appellant.

The declaration alleges that appellee is a body corporate. That appellant, on the 6th day of February, 1875, became a subscriber for thirty shares of the capital stock of appellee; that the shares were \$100 each, to be paid in such installments as the directors of appellee might call for; and that on the 1st of September, 1875, appellee, by its directors, pursuant to its by-laws and the statute laws of the State, made a call upon appellant to pay \$75 on each of his thirty shares, by which call appellant became liable to pay \$2,250; damages claimed, \$2,500.

It was stipulated between the parties that all legal defenses to the action might be proved on the trial under the general issue that might be proved under a special plea. A jury trial was had and verdict returned for appellee, fixing his damages at \$2,587.50. Appellant moved for a new trial. Motion over-

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ruled and judgment by court for \$2,587.50 and cost of suit. Appeal prayed and allowed to this Court.

Several errors are assigned, among which are:

1. Refusal of the court to give third instruction asked for by appellant.
2. In refusing to grant a new trial.
3. In rendering judgment for amount of damages found by jury.

The first point made by appellant is the refusal of the court to give the following instruction:

"If the jury find, from the evidence, that at the time the commissioners to open books for subscription to the capital stock of the proposed Esler and Ropiequet Manufacturing Company gave notice of a meeting of the subscribers for the purpose of electing directors or managers of said proposed corporation, the said capital stock had not been fully subscribed, and said commissioners knew that it had not been so subscribed, and that said capital stock was not fully subscribed at the time appointed for said meeting, and that at said meeting, one of said commissioners then subscribed eleven shares, of one hundred dollars each, to complete the full amount of the authorized subscription; and that the directors who made the call sued on in this case, were elected at said meeting; and that said commissioners, in their report to the Secretary of State of their proceedings, made it appear that said notice was given after said stock was fully subscribed, and thereby procured said Secretary of State to issue a license or certificate of the complete organization of said corporation, then the directors so elected would not be authorized to make calls for the payment of subscriptions to such capital stock; then such subscribers should afterward knowingly carry on business in the name of such proposed corporation would be liable as partners to all persons to whom such proposed corporation might become indebted in business; and if such subscription of eleven shares was made as aforesaid, without the knowledge or consent of the defendant in this case, then it was fraudulent as to him, and he cannot be compelled to pay calls upon his subscription to such stock, unless the jury further believe, from the evidence, that the defendant, after a

full knowledge of all the facts, has ratified the aforesaid acts."

It is shown, by the evidence, that when the stockholders' meeting was called, and up to the time of that meeting, the amount of necessary capital stock had not been subscribed; that just before the meeting organized, Ropiequet, one of the commissioners, made a subscription of \$1,100 in the name of Jacob J. Esler, which made the amount required. The evidence tends to show that appellant had no knowledge of the deficit in the amount, or that it had thus been made complete.

It is insisted by appellant that inasmuch as the full amount of subscription to capital stock had not been made before the stockholders' meeting was called, that under the law authorizing the corporation to be formed, Rev. Stat. Ch. 32, 286, no organization could then be had, and that a directory elected under an organization had at that meeting could not legally make a call on subscribers to the capital stock.

But the evidence shows that appellant was present and took part in the organization of the company at that meeting; that he was appointed a director and accepted the appointment, and acted as such for a time at least, and our opinion is that he is estopped from setting up such an irregularity in its organization.

The case referred to by appellant, *Bigelow v. Gregory et al.* 73 Ill. 197, is, we think, not in point. In that case the question was as to the liability of the members of the association as partners for a debt contracted by them before they had become organized under the laws of the State, and the court held that inasmuch as they had not complied with the law so as to become a corporation at the time they incurred the debt for which they were sued, they were liable as individuals for that debt, and that they could not shield themselves from their personal liability by showing that they had afterward become incorporated. See *Angell & Ames on Corporations*, 636; *Kansas City Hotel v. Harris*, 51 Wis. 464; *Danbury & Norwalk R. R. Co. v. Wilson*, 22 Conn. 435; *Law v. Brainard*, 30 Conn. 577; *Smith v. Hardecker*, 39 Mo.

And in *Stone v. G. W. Oil Co.*, 41 Ill. 85, the court holds that the subscriber is estopped when he participates in the

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organization and acts as director. We therefore hold that the court properly refused that instruction.

Another point urged by appellant is that he was induced to make the subscription through the false and fraudulent representations of Ropiequet and Esler, who were appointed commissioners to solicit subscriptions to the capital stock prior to its organization. While there has been much controversy in the courts of this country over this question of fraudulent misrepresentations by commissioners in the procurement of stock subscriptions, we think the doctrine is pretty well settled that this defense is not available. In *Smith v. Hardecker*, 39 Mo. 157, a case in its leading features almost identical with this case, and in *Cally v. R. R. Co.*, a recent decision of the Supreme Court of Pennsylvania, and referred to with approval by Wharton on Contracts in note to Sec. 1068, the courts say: "These commissioners are not agents of the corporation, for it is not yet in being;" and a subscriber to the capital stock cannot set up fraudulent representations by such commissioners as a release of his obligation to pay his subscription. A different rule rightly obtains where a corporation sends out its agents to procure subscriptions, and subscriptions are obtained by fraudulent representations. In such case it is held that the fraud may be set up in bar of a recovery; but this is upon the ground that the corporation is responsible for the act of its agents, and most of the American authorities referred to by appellant in support of his theory are upon subscriptions obtained by the agents of the corporations after they are organized.

Another question is raised by appellant, which, if his view is correct, must prevent a recovery.

The records of appellee, introduced in evidence, show that at a meeting of the board of directors held on the 10th of March, 1877 (after appellant had resigned his directorship and demanded a cancellation of his subscription), a resolution was passed authorizing an arrangement with certain subscribers to the capital stock, by which, upon giving their individual notes for one-half of their subscriptions they were to be released from the payment of the other half, and that this arrangement was

made with quite a number of the original stock subscribers, and their notes taken and accepted for a moiety of their subscriptions in full satisfaction.

Did this act of the board release appellant from his obligation to pay his subscription?

The courts of this country, with but few exceptions, have held that a release of a portion of the subscribers to the capital stock releases all the subscribers who do not assent to that release, or in some way give their sanction to it. *Pittsburgh & Connellsville R. R. Co. v. Graham*, 8 Casey; *P. & C. R. R. Co. v. McCally*, *Ib.*; *P. & C. R. R. Co. v. Graham*, 2 Grant, 259; *Stewart v. Trustees Hamilton College*, 2 Denio, 403; *Crawford County v. Pittsburgh & Erie R. R.*, 32 Penn. 141, and *N. Y. Exchange Co. v. De Wolf*, 31 N. Y. 273, all hold this doctrine.

In some of these cases the release had been effected before the *bona fide* subscriptions were obtained, in others after it had been obtained, as in this case. It destroyed that equality that exists between subscribers, according to the terms of their subscriptions, which is the very essence of the contract; and in *Angell & Ames on Corporations*, in discussing what will and what will not release a subscriber to capital stock from his liability, the author says: "If a stock company lets off a part of its subscribers and returns their money, the other subscribers, not assenting thereto, are discharged from liability growing out of their original subscriptions." *Angell & Ames on Corporations*, § 531.

Unless there was some proof that appellee had assented to this release of subscribers, or some fact appearing from which his assent could be implied, upon the authorities above cited he is released from his liability on his original subscription. And, as under the agreement that every defense that could be legally made might be made under the general issue, we hold that upon that issue the verdict should have been for appellant, and that it was error to refuse the motion for new trial, and to render judgment on the verdict of the jury against appellant.

The *ad damnum* in the declaration is \$2,500. The jury

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returned a verdict, and the court entered judgment for \$2,587.50. This was also an error, but appellee filed a *remittitur* in this court for \$87.50, which cured that error so far as the *ad damnum* laid in declaration is concerned, but we are unable to say whether the assessments and interest amount to that sum or not, as the record wholly fails to show when the call for \$75 on the shares was made. The only evidence that a call was ever made that we find in the record is the statement of the secretary of the board, in his oral testimony, that he had notified appellant of the call and requested payment. But since this case must be reversed on the other ground above stated, we regard this question as not requiring further notice.

This cause is reversed and remanded.

Reversed and remanded.

CITY OF EAST ST. LOUIS

v.

MARGARETHA KLUG.

1. CITIES—LIABILITY FOR ACTS OF SERVANTS—WHAT MUST BE SHOWN.—A person claiming damages of a city in consequence of an injury received by reason of the negligence or carelessness of a servant or agent of the city in performing an official duty, in order to a recovery, must show that the person doing the act was the agent or servant of the city in respect to the act done, and that by unskillfulness, negligence or carelessness on his part, the plaintiff received the injury complained of.

2. VERDICT AGAINST EVIDENCE—RULE.—While courts are reluctant to set aside the verdict of a jury whose province it is to pass upon questions of fact, and will not do so where there is conflicting testimony that has to be weighed, though the court may believe the preponderance of evidence against the verdict; yet it is the duty of a court to interpose and set aside a verdict when that verdict is not supported by evidence.

APPEAL from the Circuit Court of St. Clair county; the Hon. WM. H. SNYDER, Judge, presiding.

Mr. R. A. HALBERT and Mr. J. M. FREELS, for appellant; that before the tree in question could have been cut by the city

it must have been declared a nuisance by ordinance, cited *Chicago v. Laffin*, 49 Ill. 172.

Declaring it to be a nuisance does not make it so: *Ewbanks v. Ashley*, 36 Ill. 177; *Yates v. Milwaukee*, 10 Wall. 497; *Dillon on Mun. Corp.* § 308.

There must be a trial and judgment by a proper tribunal before the city can take the property of a citizen: *Bullock v. Goemble*, 45 Ill. 218; *Willis v. Legris*, 45 Ill. 289.

A municipal corporation is not liable for the unauthorized acts of its officers: *Trustees v. Schroeder*, 58 Ill. 353; *Wood on Master and Servant*, § 466.

The relation of master and servant must appear: *Hale v. Johnson*, 80 Ill. 185.

Mr. W. WINKLEMAN, for appellee; that the act done was a lawful exercise of corporate power, and the city is liable therefor, cited *Thayer v. Boston*, 19 Pick. 515; *Chicago v. Turner*, 80 Ill. 419; *Rose v. City of Madison*, 1 Ind. 281.

The tree was a public nuisance: 1 *Hilliard on Torts*, 661; *Grove v. Fort Wayne*, 45 Ind. 429; *Drake v. Lowell*, 13 Met. 292; *Day v. Milford*, 5 Allen 98; *Milford v. Holbrook*, 9 Allen 17; *Morse v. Richmond*, 41 Vt. 435; *Baker v. Boston*, 12 Pick. 192; *Manhattan Fertilizing Co. v. Van Keuser*, 8 Kan.

A public nuisance may be abated without trial, notice to the owner, or compensation: *Richardson v. Emerson*, 3 Wis. 319; *Wetmore v. Tracy*, 14 Wend. 255; *Renwick v. Morris*, 7 Hill, 575; *Parker v. Mayor etc. of Macon*, 39 Ga. 725.

Generally, upon the question of liability: *Vanderbilt v. Adams*, 7. Cow. 351; 3 *Sneed*, 20.

ALLEN, J. This was an action of trespass brought by appellee against appellant for an injury to her person.

The declaration charges that the agents and servants of appellant, in July, 1876, in cutting and falling a cottonwood tree that stood on an alley within the city limits, so unskillfully, negligently and carelessly cut the same, that it fell upon the house in which appellee lived and was then staying, and demolished the house and greatly injured the appellee in her

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person, and laid her damages at \$5,000. Appellant filed a plea of "not guilty."

At the September term, 1877, the cause was submitted to a jury, and a verdict returned for appellee for \$1,000 damages. Appellant moved for a new trial. Motion for a new trial overruled by the court. Judgment for appellee for \$1,000 and costs of suit. Appeal prayed and allowed to this court.

The evidence tends to show that one Carroll, with the aid of some others, on the 15th of July, 1876, cut a large cottonwood tree that stood near an alley in the city of East St. Louis, and that it fell upon the house of appellee, while she was in the house, broke the house down and severely injured appellee. That it was unskillfully cut, and that no notice was given of danger by Carroll.

To hold the appellant liable in this suit two things must appear from the evidence.

1. That Carroll was the servant or agent of the city, in cutting the tree.

2. That by unskillfulness, negligence or carelessness on his part appellee received her injury.

We think the evidence of his unskillfulness and negligence is sufficiently shown; but was he at the time doing this work as the agent or servant of appellant?

The testimony shows that Carroll sometimes did odd jobs for appellant. That he occasionally took contracts for repairs on streets and sidewalks, but that he had never been in the regular employ of appellant. That he often sought for jobs from appellant. That on the day before this accident occurred, he had cut a tree in another part of the city, but by whose authority is not shown by the evidence.

That on the day before this tree was cut, Carroll, the mayor (Hake) and the city engineer were seen at this tree examining it, and one Burk testifies that while Carroll was cutting the tree on the day it fell, that Mayor Hake and others were present, betting on the size of the tree and the direction it would fall. One Gibbon testifies that he heard Hake tell Carroll on the day before the tree was cut that there was another tree to cut on St. Louis avenue.

This is the substance of the testimony bearing on the point of Carroll's agency or employment by appellant, touching the cutting of this tree. Appellant introduced Hake, who testified that he was mayor at the time. Was informed by some one the day before tree was cut that people in its vicinity wanted it cut. That he and the city engineer went to look at the tree; that Carroll was along. Examined the tree. Said in Carroll's presence would not have tree cut "right then." Told engineer to make up his estimates for work on streets and alleys and lay before the council; that council would meet next day. Never saw Carroll from that time till after tree was cut; never employed him to cut tree; never said anything to Carroll about cutting tree; had no authority to employ him to do such work, and don't know of his employment by any one else to cut that tree. City paid Carroll for cutting elm tree before that time, but was not employed by him to do so, or by any one else to his knowledge. Suppose he cut it and took his chances for getting his pay from city. Was not at tree the day it was cut, or near to it. "Never offered to bet cigars or anything else about its size or way it would fall;" testimony of Burk on that subject absolutely false. Did not tell Carroll day before that there was another tree to cut.

Frاند, assistant engineer, was at mayor's most of the forenoon on day tree was cut. Hake was there; was at office all the afternoon till after heard tree fall, and Mayor Hake was in the office. Don't think Mayor Hake could have been at tree the day it was cut without his knowing it. No order for cutting this tree was made by council. Mrs. Cunningham says, saw mayor and engineer at tree day before it was cut. Carroll was near them. Witness asked Hake if he was going to have tree cut. Hake answered: "No, ma'am; I will see about it." Carroll was near by; could have heard what was said. Saw Carroll and others cutting tree next day. Did not see Hake there.

Does this evidence support the verdict? Does it sufficiently show that Carroll was the agent or servant of the city, acting under the direction of appellant in cutting this tree as to support this verdict? We fail to find any such relation as agent or servant from the evidence, and unless such relation between

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appellant and Carroll did exist in the cutting of the tree, appellant would not be liable for the injury.

While courts are reluctant to set aside the verdict of a jury whose province it is to pass upon questions of fact, and will not do so where there is conflicting testimony that has to be weighed, though the court may believe the preponderance of evidence against the verdict; yet it is the duty of the court to interpose and set aside a verdict when that verdict is not supported by evidence. *Ehrich v. White*, 74 Ill. 481; *Reynolds v. Lambert*, 69 Ill. 495; *T. W. & W. R. Co. v. Moore*, 77 Ill. 217.

Believing that the evidence in this case, as it appears of record, brings it clearly within the rule laid down in the cases above cited, and that the Circuit Court erred in refusing the motion for a new trial by appellant, the cause is reversed and remanded.

Reversed and remanded.

VALINDA B. DUGGER ET AL.

v.

DANIEL OGLESBY.

1. EVIDENCE—CERTIFIED COPY OF RECORD.—Our statute expressly provides that, upon the trial of any cause, any party may, by first complying with the provisions of the statute, read in evidence the record of any deed or a transcript of the record thereof, certified by the proper recorder, with like effect as though the original of such deed was produced and read in evidence.

2. RES ADJUDICATA—OUSTER—NOTICE TO GRANTOR.—A judicial determination to which the heirs were not parties, and of which the grantees of their ancestor gave them no notice, does not as to them, establish the fact of a divestiture of title. Where a grantee is ousted under a legal proceeding to which his grantor is not a party, he must give due notice of such proceeding to his grantor, or else, in any subsequent suit against his grantor on the covenants of his deed, he has to show the validity of the title of him by whom he was ousted.

3. COVENANTS OF WARRANTY—SUIT ON—WHAT SHOULD BE SHOWN—EXCEPTION TO RULE.—Under the covenant of general warranty, the covenantee, in order to recover, must show either that he is unable to obtain possession under the title derived from the grantor by reason of a paramount title by which the land is held adversely, or that he has been evicted by a paramount title outstanding at the time of the execution of the deed. This

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rule is however subject to exception in a case where the covenantor by his prior or subsequent acts, defeats the title that he has covenanted to warrant and defend.

4. **OUSTER BY MORTGAGEE.**—In this State, on the principle that the mortgagee is the owner of the fee, he can maintain ejectment, but where he resorts to a court of equity to foreclose and sell, the purchaser under the decree, without a deed, cannot assert a hostile title to which the plaintiff could rightfully succumb. The plaintiff's title must be defeated by a paramount legal title, under which he could oust the plaintiff. The foreclosure sale, deed and eviction should all be shown in an action against the grantor on his covenants.

5. **COVENANT FOR QUIET ENJOYMENT—WARRANTY—SPECIAL BREACH—PROOF—VARIANCE.**—In the case of covenants for quiet enjoyment and general warranty, the assignment of a breach must be special, otherwise the covenantee might recover for an eviction occasioned by his own acts. The special breach averred must be the breach proven, otherwise there will be a variance, and in the case of an exception, the plaintiff both by his pleading and proof must bring himself within the exception.

6. **SUIT AGAINST HEIR—PROOF OF ASSETS.**—The evidence in this case is wholly insufficient to support the findings of the court, because it nowhere shows that property, either real or personal, to any certain value had ever descended or been distributed to the heirs.

7. **ACTION AT LAW AGAINST HEIR.**—The statute expressly gives the right to maintain against the heir or devisee the same actions which lie against executors or administrators, and to maintain joint actions.

8. **PARTIES—JOINING ADMINISTRATOR—WIDOW.**—The administrator was necessarily made a party defendant. The assets in his hands are primarily liable for the debts of the deceased, and under the statute suit against the heir without joining the administrator can be had only in two cases—where there is no administration within a year, and where a judgment has already been obtained against the administrator, and there are no personal assets. The widow was properly made a party defendant, she being an heir, at least to the extent of one-third of the personal estate.

9. **PRACTICE—FORM OF JUDGMENT.**—The judgment, being personal against the widow and children, and against the administrator of assets *quando acciderint*, was erroneous. It should have been *in solido* against the administrator, widow and heirs. The order as to the administrator should have been *quando acciderint*, and the widow and heirs should have been subjected to no greater liability than the value of the estate that descended to them, exclusive of the widow's award, and the court should have ascertained this value.

APPEAL from the Circuit Court of Madison county; the Hon. WM. H. SNYDER, Judge, presiding.

Messrs. GILLESPIE & HAPPY, for appellants; contending that if a purchaser fails to protect himself against incumbrances

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by requiring a covenant, it is his own fault, cited *Jackson v. Ewing*, 17 Ind. 505.

That the claim of *Pearce* was not a title, nor even an incumbrance: *Dobbins v. Brown*, 2 Jones, 75; *Rawle on Covenants*, 232; *Ellis v. Welch*, 6 Mass. 249; *Barley v. Miltenberger*, 31 Penn. 37.

Where the covenantor himself does an act asserting title, it constitutes a breach of the covenant for quiet enjoyment: *Beebe v. Swartwout*, 3 Gilm. 163; *Bostwick v. Williams*, 36 Ill. 65; *Sedgewick v. Hollenbrook*, 7 Johns. 380; *Brady v. Spurck*, 27 Ill. 478; *Moore v. Vail*, 17 Ill. 185; *Claycomb v. Munger*, 51 Ill. 373.

Under covenants for quiet enjoyment and general warranty the assignment of breaches must be special by showing an older title: *Marston v. Hobbs*, 2 Mass. 437; *Owen v. Thomas*, 33 Ill. 320; *Rawle on Covenants for Title*, 200; *Jones v. Warner*, 81 Ill. 343.

The action for breach of covenant of warranty should be brought by him who owned the land when the breach took place: 2 *Washburn on Real Property*, 713.

The judgment should have been joint against all to the extent of assets descended: *Vanmeter v. Love*, 33 Ill. 260.

Because appellee might have had the special pleas or the special matter contained in the notice, stricken from the files, but did not do so, is no reason why evidence offered under such pleas or notice should be excluded: *Gilmore v. Nowland*, 26 Ill. 200; *Burgwin v. Babcock*, 11 Ill. 28; *Hunt v. Weir*, 29 Ill. 83.

A party is not estopped to show that no consideration in fact was paid for a deed: *Kimball v. Walker*, 30 Ill. 482.

Messrs. METCALF & BRADSHAW, for appellee; that *Dugger* was not an innocent purchaser for value of the property, cited *Renfro et al. v. Pearce*, 68 Ill. 126.

The heir is liable for the debt of his ancestor, to the extent of the property received from him: *Ryan v. Jones*, 15 Ill. 1.

An actual eviction is not necessary, but the covenantor or his assigns may yield to a paramount title: *McConnell v.*

Downs, 48 Ill. 271; Harding v. Larkin et al. 41 Ill. 413; Claycomb v. Munger, 51 Ill. 373.

A certified copy of the record of the deed was admissible in evidence: Rev. Stat. 720; 1 Chitty's Pl. 374; Rogers v. Miller, 4 Scam. 333; Palmer v. Logan, 3 Scam. 56.

Notice of special matter and special pleas cannot both be filed with the general issue: Gilmore v. Nowland, 26 Ill. 200.

To recover on a covenant for quiet enjoyment, it is not necessary to aver an outstanding title; it is only necessary to show an eviction: Beebe v. Swartwout, 3 Gilm. 163; Furness v. Williams, 11 Ill. 229; Ohling v. Luitjens, 32 Ill. 23; Brady v. Spurek, 27 Ill. 478; 2 Johns. 395; 7 Johns. 258; 11 Johns. 122.

There is a difference between an eviction under covenant for quiet enjoyment, and one under that of warranty: Fowler v. Poling, 6 Barb. 165; 2 Washburn on Real Property, 665; 5 Kent. 571; 5 Johns. 121.

Appellee is estopped from disputing facts that have been judicially settled by the foreclosure decree, sale and deed: Sisk v. Woodruff, 15 Ill. 15; 27 Ill. 478; 33 Ill. 320.

As to proper parties plaintiff: 2 Washburn on Real Property, 662; 68 Ill. 125; Ryan v. Jones, 15 Ill. 1; Vanmeter's Heirs v. Love's Heirs, 33 Ill. 260.

BAKER, J. Oglesby impleaded appellants in covenant. The declaration alleged that Edward C. Dugger, now deceased, with Valinda B. Dugger, his wife, on the 29th day of July, 1867, in consideration of \$4,000, conveyed certain described lots in the town of Ashley, in Washington county, Illinois, to William Vance, and his heirs and assigns forever, and that said Dugger and wife, by the same deed covenanted to and with said Vance, his heirs and assigns, and for themselves, their heirs, executors and administrators, as set forth in said declaration. The declaration further averred that on the 16th of August, 1867, said Vance and his wife conveyed said lots to John Criley, and that said Criley and his wife, on the first day of January, 1869, in consideration of the sum of \$3,500, conveyed said premises to the plaintiff. The breach assigned in said declaration is hereinafter specially referred to. The declaration further

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averred that on the 23d day of August, 1869, the said Edward C. Dugger departed this life, intestate, leaving as his heirs Valinda B., his widow, and Alfred P., John W., Millard, Ellen, Edward, Julia and Augustus Dugger, his children. Alfred J. Parkinson was appointed administrator of his estate. That there was real estate and personal property inherited from, and distributed to the said widow and heirs, from the said Edward C. Dugger, deceased, before the commencement of the suit, in the sum of twenty thousand dollars, and that Parkinson was the guardian of said minor children, Millard, Edward, Julia and Augustus. Plaintiff further averred a demand and refusal before suit, and the *ad damnum* was \$5,000.

To this declaration the defendants below filed three pleas:

1. *Non est factum.*
2. *Nul tiel record.*
3. Performance; with which pleas a notice was filed:
 1. That the title was in Dugger when he made the deed.
 2. That when the order of the Circuit Court of Washington county was made, Dugger was dead and his heirs were not made parties, and that they did not have notice.
 3. That there was *no consideration paid* by plaintiff to Criley.
 4. That defendants have not inherited any property from Dugger.
 5. That no demand was made as averred.
 6. That Pearce had no title when the deed was made by Dugger.

Issues were formed upon these pleas, and no motion was interposed to strike out either the special pleas or the notice of special matter. Without objection the parties tried the cause upon the pleas and notice, and it is therefore unavailing for the appellee to now complain in his argument, even if cross-errors had been assigned. *Hunt v. Weir*, 29 Ill. 83.

By agreement the cause was tried in the Madison Circuit Court, by the judge, without a jury, and the following judgment was entered: "And now on this day, the court being fully advised, it is considered that the issues be found for the plaintiff, and that said defendants (except the said administrator)

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are heirs of said Edward C. Dugger. That said Dugger left about \$5,000 worth of personal property, and \$10,000 worth of real estate, which said heirs received according to the statute of descents and distributions, and that said administrator had accounted for and paid over all said money to said heirs before the institution of this suit. It is therefore considered and ordered by the court that the plaintiff have judgment in his favor and against the defendants, except said administrator, for the sum of \$3,500, with legal interest thereon from the date of his eviction, October 28th, 1874, or \$4,114.83. It is therefore ordered by the court that the said plaintiff have and recover of the said defendants (except said administrator) the said sum of \$4,114.83, being the amount of the damages, together with his costs and charges herein expended, and that he have execution therefor against said defendants, and as to said administrator, that the judgment be of assets, *quando acciderint*." Exceptions were taken, and the case is brought to this court by appeal.

On the trial of this cause, appellee introduced in evidence a power of attorney from Edward C. Dugger and wife to G. Wright, which authorized him to bargain, sell, grant, convey and confirm, the lots in question with covenants of warranty.

He also introduced in evidence a certified copy of a deed for said lots, from said Dugger and wife, to William Vance, he first orally, in court, under oath, laying the foundation required by statute, for the introduction of a certified copy. Said deed is signed as follows:

EDWARD C. DUGGER, [SEAL.]

By G. Wright, his attorney in fact.

HARRIET V. B. DUGGER, [SEAL.]

By G. Wright, her attorney in fact.

And the acknowledgment is as follows:

State of Illinois, }
Washington County. } ss.

I, G. T. Hakes, notary public in the town of Richview, in the county and State aforesaid, do hereby certify that Edward C. Dugger, and Harriet V. B. Dugger, who are personally known to me as the same persons whose names are subscribed to the annexed deed, appeared before me this day in person, and

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acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act, for the uses and purposes therein set forth. And the said Harriet V. B. Dugger, wife of the said Edward C. Dugger, acknowledged that she had freely and voluntarily executed the same, and relinquished her dower to the lands and tenements therein mentioned, and also her rights and advantages under and by virtue of all the laws of the State, relating to the exemption of homesteads, without compulsion of her said husband, and that she does not wish to retract the same.

Given under my hand and official seal this twenty-ninth day of July, A. D. 1867.

[SEAL.]

GEO. T. HAKES, Notary Public.

The consideration expressed in said deed is \$4,000; and it is upon the covenants contained in this deed that the present suit is brought.

He also introduced in evidence a deed for said lots from William Vance to John Criley, and a deed from John Criley to himself. Both of these latter deeds were for the premises in question, and the deed from Criley is dated January 1, 1867, and the consideration expressed therein is \$3,500. Full covenants of warranty, etc., are contained in all of these deeds.

The appellee also introduced in evidence a transcript of the proceedings of the Washington County Circuit Court, in the matter of a certain bill in Chancery, wherein one Edwin Pearce was complainant, and William Renfro, Elizabeth Renfro and said Edward C. Dugger, were defendants; and also a transcript of the proceedings of said Washington Circuit Court in the matter of a petition of said Pearce, for a writ of assistance, and in connection therewith two decisions of the Supreme Court of the State reported in 68 Illinois Reports, on pages 125 and 220, one of said decisions having been rendered in the said Chancery case, and the other in the matter of the said application for a writ of assistance.

This evidence taken together shows about this state of facts. That said Pearce and said Win. P. Renfro were merchandising as partners from 1864 until December 1866; that the partnership was then dissolved and that Renfro was constituted trustee

of the goods of the firm for the purpose of converting them into money by sale at retail, and paying the debts of the firm; that Renfro exchanged the goods for the lots in question, and had the deed made to his wife, Elizabeth, and that Elizabeth conveyed to her brother, Edward C. Dugger, and that he, Dugger, knew how the lots had been acquired by Renfro. Upon the bill filed by Pearce, it was held that equity would follow the property thus acquired, and subject it to the payment of the firm debts. The bill was filed March 4th, 1867, and all three of the defendants answered the bill. On the 29th day of July, 1867, and pending the litigation, Dugger and wife executed the deed, upon the covenants of which this suit is predicated.

Under the decree in this chancery suit, the lots were sold by the Master in Chancery on the 20th day of June, 1868, to Pearce for \$2,000. They were sold subject to redemption, and a certificate of purchase was executed. The decree made no order on the defendants to surrender possession on the execution of a deed. In 1871, the original petition for a writ of assistance was filed by Pearce, and various orders were subsequently made in said proceedings, and in 1874, upon remand from the Supreme Court, the petition was amended, and on the 27th day of October of that year a final order was made and a writ of possession awarded. Edward C. Dugger died intestate on the 23d day of August, 1869, and his heirs were not made parties to these proceedings for the possession of the premises, nor was any notice of said proceedings given to them, either by Pearce or by Oglesby. The appellee was evicted from the premises October 28th, 1874.

It was admitted on the trial below that the appellants, except Parkinson, were the widow and heirs at law of said Edward C. Dugger, deceased; that said Dugger left about \$5,000 in personal property and \$10,000 worth of real estate; that after the payment of debts, said administrator had paid over and settled with said widow and heirs the balance of the estate before the institution of this suit. There was evidence on some collateral points that it is unnecessary to refer to.

Appellants introduced in evidence the deposition of Criley and a letter written by appellee to Criley, for the purpose of

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impeaching the consideration of \$3,500 expressed in the deed from Criley to appellee.

Appellee then introduced William Vance in rebuttal, who testified that Criley was his son-in-law, and not having paid him, Vance, the consideration for the property, an arrangement was made between him, Oglesby and Criley, whereby the purchase money of \$3,500, was paid to him, Vance.

Numerous errors are assigned upon this record, and the more important of them we will proceed to notice.

The first points that we will note are the objections made to the introduction in evidence of the certified copy of the deed to Vance. The first objection made to its introduction is that it is the foundation of the suit, and that therefore a certified copy of it cannot be used in evidence, and that the suit should have been brought upon the deed as a lost instrument. This objection might have been good at common law, but our statute expressly provides, that upon the trial of any cause in law or equity, any party to said cause may, by first complying with the provisions of the statute, read in evidence in any court in this State, the record of any deed or a transcript of the record thereof, certified by the proper recorder, with like effect as though the original of such deed was produced and read in evidence: Rev. Stat. 1874, 279, § 36.

As to the second objection urged to its introduction, we would say that the certificate of acknowledgment is unusually full and formal; contains all of the statutory requirements, and conclusively shows that the grantors in the deed appeared in person before the officer and made the requisite acknowledgment. *Kerr v. Russell*, 69 Ill. 666; *Monroe v. Poorman*, 62 Ill. 523.

It may be unusual for persons who have given a power of attorney authorizing the making of a deed, to appear themselves in person before the proper officer, after the deed has been properly executed by their attorney in their names, and themselves acknowledge the execution of it; at the same time it is not impossible, or even improbable, that such a thing should be done. We are of opinion that the court properly overruled the objections made to the introduction of this deed in evidence.

Among the questions raised by this record is this: We have already seen, that while Dugger was a party to the original chancery suit of Pearce, yet, neither he nor his heirs were party to the subsequent proceedings under the petition for a writ of assistance. The decree does not find that the legal title was not in Dugger, nor does it divest him of the title. It expressly recognizes his legal title, but finds that he holds his legal title subject to certain equities in Pearce and the creditors of the firm of Renfro & Pearce, and directs that the lots be sold for the payment of the partnership debts, allowing fifteen months for redemption. It does not follow from this decree that Dugger, or his grantees, ever were divested of the legal title. We do not say that the court erred in admitting in evidence the record of the proceedings of the Washington Circuit Court in the matter of the petition for a writ of assistance. These were admissible just as proof of an actual ouster was admissible. But we do say that the judicial determination in that proceeding, to which the heirs of Dugger were not parties, and of which the grantees of their ancestors gave them no notice, did not, as to them, establish the fact of a divestiture of title. From aught that they know or we know, from this record, Pearce may never have procured a deed from the master. Many sales are made by masters in chancery that never culminate in a conveyance of the fee. Where a grantee is ousted under a legal proceeding, to which his grantor is not a party, he must give due notice of such proceedings to his grantor, or else, in any subsequent suit against his grantor on the covenants of his deed, he has to assume the burden of proving the validity of the title of him by whom he was ousted. Nor do we deem it material that, in the present instance, Pearce elected to proceed against Oglesby by petition for a writ of assistance, instead of by an action of ejectment. There is clearly a link wanting in this part of the case, and that link is the deed to Pearce, if any such deed there be. *Fisk v. Woodruff*, 15 Ill. 15; *Claycomb v. Munger*, 51 Ill. 373.

The averment in the declaration of a breach is as follows: "And the plaintiff avers that the said Edward C. Dugger or Valinda B. Dugger have not warranted and defended the same

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premises to the plaintiff, or his grantors, against all lawful claims whatsoever, but on the contrary thereof, the plaintiff in fact says at the time of the date, sealing and delivery of said deed by the said Edward C. Dugger as aforesaid, the paramount title to said premises was in one Edwin Pearce, by virtue of which said paramount title to said premises, the plaintiff afterwards, to wit: on the 27th day of October, A. D. 1873, was evicted, etc.

There is a variance between the allegations and the proofs. The averment is that at the time of the date and delivery of the deed to Vance, the paramount title was in Pearce, by virtue of which paramount title the plaintiff was afterwards evicted; whereas the proof shows that at the time the paramount title was, as a matter of fact, not in Pearce. In *Owen v. Thomas*, 33 Ill. 320, where the breach assigned was, that at the time the deed was made the legal title was not in defendant but was in Robertson and others, and that their title was paramount, and that plaintiff could not obtain possession of the land, the defendant having plead that at the time conveyance was made the fee was in defendant, and that he conveyed same to plaintiff, the defense was held to be good. In the case of covenants for quiet enjoyment and general warranty, the assignment of a breach must be special. *Marston v. Hobbs*, 2 Mass. 437.

In this State, on the principle that the mortgagee is the owner of the fee, he can maintain ejectment, but where he resorts to a court of equity to foreclose and sell, the purchaser under the decree, without a deed, cannot assert a hostile title to which the plaintiff could rightfully succumb. The plaintiff's title must be defeated by a paramount legal title, under which he could oust the plaintiff. The foreclosure sale, deed and eviction, should all be shown. See, in this connection, *Brady v. Spurck*, 27 Ill. 478.

There is a difference between an eviction under the covenant for quiet enjoyment, and under that of warranty. The former relates only to the possession, and the eviction is merely required to be of lawful right, while the latter relates to the title, and the eviction must be not only by lawful right, but by

paramount title. 2 Washburn, Real Prop. 665; Fowler v. Paling, 6 Barb. 165.

It is true that the general doctrine is that under the covenant of general warranty, the covenantee, in order to recover, must show either that he is unable to obtain possession under the title derived from the grantor, by reason of a paramount title by which the land is adversely held, or that he has been evicted by a paramount title outstanding at the time of the execution of the deed. Beebe v. Swartwout, 3 Gil. 162; Moore v. Vail, 17 Ill. 185; Claycomb v. Munger, 51 Ill. 373; Bostwick v. Williams, 36 Ill. 65, and Brady v. Spurck, *supra*.

This general rule is subject, however, to some exceptions, one of which is, where the covenantor, by his prior or subsequent acts, defeats the title that he has covenanted to warrant and defend. Where a plaintiff can show an eviction under a paramount title derived from a wrongful subsequent sale by the grantor, or derived from an act of the grantor, prior to the sale to him, and which after such sale, culminates in paramount title, then he can maintain an action on the covenant of general warranty. Jones v. Warren, 81 Ill. 343.

But, as we have seen in the case of this covenant and in the case of covenant for quiet enjoyment, the breach must be special, otherwise the covenantee might recover for an eviction occasioned by his own acts. The special breach averred must be the breach proven, for otherwise there will be a variance, and if the case of the plaintiff is the case of the exception, then the plaintiff, both by his pleading and proof, must bring himself within the exception. It is suggested by appellee that the maxim "*Utile per inutile non vitiatur*," will apply to his declaration in this case, and that the whole of the covenant, except that plaintiff was evicted by a superior title in one Pearce, could be rejected as surplusage. But the rule contended for would not apply to the case at bar, for the averment is not foreign and impertinent to the cause, nor is it repugnant to precedent matter, but the very ground of action is misstated.

The matter that is claimed to be surplusage, we regard as substantive, for suppose it stricken out and the averment simply

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to be as suggested, that appellee was evicted by a superior title in one Pearce, *non constat*, but that such superior title may have grown out of the act of appellee himself, the plaintiff must recover, if at all, *secundem allegata et probata*. *McConnell v. Kibbe*, 33 Ill. 175; *Boynton v. Robb*, 41 Ill. 349; *Rudd v. Williams*, 43 Ill. 385.

The deed from Dugger to Vance is in the record in this case, and contains covenants, perhaps somewhat variant from the covenants alleged in the declaration. Upon the covenants contained in the deed, the plaintiff can readily frame breaches under which he can recover, if so entitled, upon the supposed state of facts in the case.

Another point upon which the evidence in this case is wholly insufficient to support the findings of the court is, that it nowhere shows that property, either real or personal, to any certain value, had ever descended or been distributed to the heirs. It may be true that Dugger left about \$5,000 in personal property, and \$10,000 worth of real estate, and that after the payment of debts, the administrator had paid over and settled the balance with the widow and heirs, but it nowhere appears from the evidence what the balance was. The payment of the debts may have absorbed nearly all of the estate, and the amount distributed may have been a merely nominal sum, or, at all events, a sum not sufficient in any view of the law to justify a judgment for \$4,114.83, and the awarding of execution against the heirs for that amount. In fact, the phraseology of the admission in regard to this balance paid over, would rather seem to imply that it was a balance in the hands of the administrator of the whole estate after a sale of the real estate, otherwise, how could the administrator have settled it with, or paid it to, the heirs?

Considerable criticism is indulged in by the attorneys for appellants upon the several sections of the Statute of Frauds and Perjuries that afford joint remedies for the debts and liabilities of a deceased person, against the executor or administrator, and against the devisees or heirs, and it is elaborately argued and seriously contended that in a case of such a character as this, the appropriate and only remedy is in chancery,

and it is even assigned as error that the court found for appellee upon the ground that there is no jurisdiction in such a case as this in a court of law.

The statute expressly gives the right to maintain against the heir or devisee the same actions which lie against executors and administrators, and to maintain joint actions, and the right to thus sue in an action at law, the devisee or heir, is expressly recognized in the cases of *Ryan v. Jones*, 15 Ill. 1, and *Branger v. Lucy*, decided by the Supreme Court at the June term, 1876, as yet unreported.

It is true that the case of *Van Meter's Heirs v. Love's Heirs*, 33 Ill. 260, was in chancery, but that was a bill by the wards for an account, and the appropriate remedy was by bill.

The administrator was properly and necessarily made a party defendant in this suit; the assets in the hands of the administrator are primarily liable for the debts of the deceased, and under the statute you can only sue the heirs without joining the administrator in two cases; where there is no administration within a year, and where a judgment has already been obtained against the administrator, and there are no personal assets. R. S. 1874, chap. 59, sections 14, 15 and 16.

Nor can the administrator complain of a judgment against him *quando acciderint*. Such judgment does not imply assets, and the heirs may have aliened the real estate before suit brought, and may be insolvent, and after discovered assets may come to the hands of the administrator, in which event the plaintiff would be entitled to have a *scire facias*.

If we admit that by the 11th and 12th sections of this statute remedy is given against the heirs only as to real estate descended, yet that makes no difference in this case. The contract of the ancestors was under seal, and the heirs were expressly included in the covenants of the deed, and by the common law the heirs of the contracting party when expressly named in the contract are liable to an action for the breach of it, if they have legal assets by descent from the obligor. But if it was only in particular cases that heirs were liable, as to lands descended, for the debts of the intestate, and in those cases only when they had not aliened before suit brought.

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Therefore, the necessity for these statutory provisions. Ryan v. Jones, *supra*.

The widow was properly joined as a party defendant under our statute of descent. She is in any event as to one-third of the personal estate of the intestate, an heir of the intestate. But we are unable to see upon what theory the guardian of the infant heirs of Dugger was made a defendant in this suit, or what judgment could properly be rendered against him. R. S. Chap. 59, Sec. 17, and Chap. 64, Sec. 18.

The judgment rendered by the court below was erroneous. It was personal against all the children and the widow for \$4,114.83, and for costs, and it awarded execution against them for that amount, and then the administrator, too, was expressly excluded from such judgment, and the order as to him was that the judgment be of assets *quando acciderint*, but for what sum *quando acciderint* nowhere appears. Under an execution issued on this judgment, the whole amount of the judgment might well be made by the sale of the property of one of the children alone, or of the widow alone, although there can be no claim under the evidence that any one of the appellants has inherited that value of property from the intestate.

The assessment of damages and the judgment should have been *in solido* against the administrator and the heirs, including the widow. No execution should have been awarded against the administrator, but as to him, the judgment should have been *quando acciderint*. The widow should have been subjected to no greater liability than the value that she had received under the statute of descents, and excluding widow's award, from the personal estate of her husband, and this value should have been ascertained by the court. Each of the several children should have been subjected to no greater personal liability than the amounts that they had severally received from the personal estate of their father, and the value of the rents and profits, if any, that they had severally received issuing out of real estate inherited from him; other than thus stated, and in the absence of proof of any *bona fide* alienations before action brought, they would be answerable for nothing "as if the same were their own proper debts," but the judgment,

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otherwise than as indicated, should have been rendered against them, to be satisfied only out of the real estate which descended to them from their intestate father. *Van Meter's Heirs v. Love's Heirs, supra; Branger v. Lucy, supra.*

It is true that the consideration expressed in the deed from Criley to Oglesby may be inquired into, but we deem it wholly immaterial whether such consideration was paid directly to Criley, or by his consent settled with Vance. The evidence is somewhat conflicting as to what the amount of the actual consideration was, but as there will probably be a second trial of the case, it is inexpedient to discuss the evidence upon this point.

For the errors indicated, the judgment of the Circuit Court will be reversed, and the cause remanded.

Reversed and remanded.

WILLIAM C. TAYLOR, Adm'r

v.

GEORGE THOMPSON.

1. **PROMISSORY NOTE—INNOCENT PURCHASER—FRAUD.**—It was urged in defense that the form of the note in suit and its indorsements were such as should put a purchaser upon inquiry, but the evidence showed no fraud in obtaining the execution of the note, and even if the transaction was fraudulent in reference to the consideration of the note, that taint could not follow it into the hands of an innocent purchaser.

2. **FAILURE OF CONSIDERATION.**—A failure of consideration in whole or in part, or fraud in the consideration of the note, cannot be set up as a defense, where the note has been assigned before its maturity for a valuable consideration, without tracing its defects to the knowledge of the assignee.

APPEAL from the Circuit Court of Perry county; the Hon. AMOS WATTS, Judge, presiding.

Messrs. T. T. & D. W. FOUNTAIN, for appellant; that want or failure of consideration cannot be set up against an innocent purchaser before maturity, cited Rev. Stat. 1874, Chap. 98, § 9.

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The fraud which would vitiate must relate to the obtaining of the note, and not to its consideration: Woods v. Hynes, 1 Scam. 103; Mulford v. Shepard, 1 Scam. 583; Adams v. Wooldridge, 3 Scam. 255; Latham v. Smith, 45 Ill. 25; Shipley v. Carroll, 45 Ill. 285.

To make failure of consideration a defense, it must be shown that appellee is not a *bona fide* purchaser: Stacker v. Watson, 1 Scam. 207; Topper v. Snow, 20 Ill. 434; Mitchell v. Deeds, 49 Ill. 416.

The indorsee is presumed to have taken the note in due course of trade, before maturity, in the absence of proof to the contrary: Depuy v. Schuyler, 45 Ill. 306; Wightman v. Hart, 37 Ill. 123; Mulford v. Shepard, 1 Scam. 583.

That the indorsee could sue in his own name, the indorsement being in the nature of a guaranty: 2 Parsons on Bills, 53; Upham v. Prince, 12 Mass. 14; Blakely v. Grant, 6 Mass. 386; Myrich v. Hasey, 27 Me. 9.

An agreement that the note would not be collected unless the agent returned and fixed up the machine, was not proper to be shown: Foy v. Blackstone, 31 Ill. 538; 2 Parsons on Bills 509.

Messrs. HAMMOCK & DAVIS, for appellee; that the Davis Sewing Machine Co. is bound by the acts of their agent, the payee in the note, and is not an innocent purchaser, cited Story on Agency, § 33; Commercial Ins. Co. v. Ives, 56 Ill. 402; R. R. I. & St. L. R. R. Co. v. Wilcox, 66 Ill. 417; St. L. & M. Packet Co. v. Parker, 59 Ill. 23.

That the form of the note should have put appellant upon inquiry, and he is bound to make such inquiry: Sims v. Bice, 67 Ill. 88; Le Neve v. Le Neve, Leading Cas. Eq. 158.

That the Davis Sewing Machine Co. could not buy the note, being an incorporated company: Angell and Ames on Corporations, § 111; Beatty v. Lessee of Knowles, 4 Pet. 152; N. Y. F. Ins. Co. v. Ely, 2 Cow. 664; Lowe v. Bennet, 5 Conn. 574.

TANNER, P. J. This case was tried in the Circuit Court of Perry county, on appeal from a justice of the peace, and

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a verdict and judgment obtained for the appellee, from which the appellants appealed.

The appellants on the trial offered in evidence, with its indorsement, the following promissory note:

"\$75.

"JANUARY 10, 1874.

"Eighteen months after date, I promised to pay to the order of A. J. Shepherd, seventy-five dollars, payable at Adams' express, Coultersville, Ill., for value received, with ten per cent. interest from maturity. I hereby confess judgment for the above sum, with ten per cent. fees, if collected by an attorney. This note is given subject to the conditions on the back. I also agree to make no payment on this note to any agent unless he has this note in his possession, and indorses the payment on the back at the time it is made.

"GEORGE ^{his} + THOMPSON,
mark.

"P. O. address, Coultersville, Ill.

"Witness, S. E. BALDWIN."

Upon the end of said note is (printed) the following:

"Remington Sewing Machine, N. J. Shepherd, general agent, 617 North Fourth street, St. Louis, Mo.

"Upon the back of said note are the following indorsements:

"For value received, I hereby guarantee the prompt payment of the within note.

"(Signed)

N. J. SHEPHERD,

"MG'R. P.

"Pay John Taylor for collection account of J. B. Collins."

The appellee then testified that the note was given to one Baldwin for a sewing machine. That Baldwin took the machine to his house to sell it to him, but his family did not know how to use it, and Baldwin had no needles with him, and could not teach his family, but he was to return in a few days and teach them; and if he did not he would return the note. That he, appellee, then signed and delivered the note, after having it read in presence of his family and one Woodsides, who was a shrewd business man, and would know if anything was wrong about it. That Baldwin said the machine would stand good for itself. That his family could not use it; it would not run; it was out of repair, and that he had never seen Baldwin since he gave the note, and when sued he took the machine and left

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it with the justice at his office. In these statements the appellee was fully corroborated.

The appellants then read in evidence the deposition of J. B. Collins here following:

"I am the general manager of western business of Davis Sewing Machine Company, and reside at Chicago. I have been manager for said company for three and a-half years past, with office at Chicago; and for a year prior to that time with office at St. Louis. Have whole control of business for West. No other person in the West has had authority to employ agents to sell machines for said company, or make contracts during the time I have been manager of said company. N. J. Shepherd has had no connection with the Davis Sewing Machine Company during the time I have been manager. He bought machines of the company, and agreed to pay for them, but never was agent of the company in any way. The note in suit was received by the company from N. J. Shepherd, January 16, 1874, and has been owned and under the control and possession of the company ever since. Mr. Shepherd had been purchasing machines of the company, for which he was indebted for more than amount of said note; he sent the note to us—said company—to be credited upon his indebtedness. The note was received by said company, and said Shepherd was given credit upon his account at the time for the full amount of the note, as he requested. Neither the Davis Sewing Machine Company nor myself had any knowledge of any contract or arrangement upon which said note was given at the time it came into the hands of the company, except what the note showed on its face. At the time of taking the note I had not heard of any defense to said note, and never knew of any until we attempted to collect the note after it became due. S. E. Baldwin has never had any connection whatever as agent, or in any other capacity, with the Davis Sewing Machine Company. The indorsement, 'Pay to John Taylor for collection account of J. B. Collins, manager,' on the back of said note, was made by my authority acting for said company, as manager; it was made to John Taylor for collection."

The appellee insists, first, that the note was given without consideration; secondly, that it was obtained by fraud.

The only evidence tending to show a want of consideration is that of the appellee and his daughter, and is that "the machine was not in repair and would not run." No evidence was given to show the value of the machine, or in what respect the same was not in repair, or that it was of less value than the consideration expressed in the note. Still, had this been done, it would have secured no advantage to the appellee. A failure of consideration in whole or in part, or fraud in the consideration of the note, cannot be set up as a defense, where the note has been assigned before its maturity for a valuable consideration, without tracing its defects to the knowledge of the assignee.

It is next urged that the form of the note and its indorsements throw a suspicion upon its character, and should put a purchaser upon inquiry before purchasing. The only reply we make to this view of the case is, that the evidence shows no fraud in obtaining the execution of the note, and were the transaction fraudulent in reference to the consideration of the note, this taint could not follow it to the hands of an innocent purchaser.

Again, it is urged that the "Davis Sewing Machine Company cannot buy notes in the usual course of trade." The authorities cited in behalf of this position do not sustain the view taken of them by the appellee; they are all to the point that corporations organized for manufacturing or mechanical purposes cannot go beyond their chartered powers and engage in banking purposes, and in discounting commercial paper, where the charters forbid it, or do not confer the power.

We think the Circuit Court should have rendered judgment for the appellants for the amount of the note, with interest. The judgment is therefore reversed, and the cause remanded.

Reversed and remanded.

Moore v. Mauk.

EZEKIEL B. MOORE

v.

MATTHIAS MAUK.

1. SLANDER—AFFIDAVIT.—The slander complained of was, that the plaintiff had sworn falsely in an affidavit filed by him in a chancery cause. The preponderance of evidence, under a plea of justification, going to establish the falsity of the facts stated in the affidavit, the verdict is set aside as being against the weight of the evidence.

2. JUSTIFICATION—MITIGATION OF DAMAGES.—If it appears that the defendant, although he cannot fully justify, had reason to believe from the plaintiff's own conduct that the charge was true, then such fact should be considered in mitigation of damages.

3. VERDICT—CONFLICTING EVIDENCE.—If the finding of the jury is manifestly against the weight of evidence, the verdict will be set aside, even where there is some evidence in favor of the verdict, and in actions *ex delicto* courts will interfere with verdicts in order to prevent manifest injustice.

APPEAL from the Circuit Court of Crawford county; the Hon. JAMES C. ALLEN, Judge, presiding.

MESSRS. WHITEHEAD & JONES, and MESSRS. CALLAHAN, JONES and MAXWELL, for appellant; that if it appear that the defendant, though he cannot fully justify, had reason to believe, from the conduct of the plaintiff, that the charge was true, such fact may go in mitigation of damages, cited Sedwick on Damages, 541; Hawver v. Hawver, 78 Ill. 412; Rev. Stat. Chap. 126, § 3.

Where it appears that the jury were governed by prejudice or caprice in making up their verdict, it will be set aside: Timmons v. Broyles, 47 Ill. 92; Peoria Bridge Asso'n v. Loomis, 20 Ill. 236; City of Chicago v. Smith, 48 Ill. 107; Chapman v. Cowry, 50 Ill. 512; Reno v. Wilson, 49 Ill. 95.

The verdict ought to be set aside, if manifestly against the weight of evidence: Scott v. Plumb et al. 2 Gilm. 595; Keaggy v. Hite, 12 Ill. 99; Baker v. Pritchett, 16, Ill. 66; Miller v. Hammers, 51 Ill. 175; Adams Express Co. v. Jones, 53 Ill. 463; Hibbard v. Malloy, 63 Ill. 471; Puterbaugh v. Crittenden, 55 Ill. 485; Waggeman v. Lombard, 56 Ill. 42; Goodwin v. Durham, 56 Ill. 339; C. & A. R. R. Co. v. Purvines, 58 Ill. 38; Smith

v. Slocum, 62 Ill. 354; Knott v. Skinner, 63 Ill. 239; Reynolds v. Lambert, 69 Ill. 495; Ill. Cent. R. R. Co. v. Chambers, 71 Ill. 519; St. P. F. & M. Ins. Co. v. Johnson, 77 Ill. 598.

Messrs. WILKIN & WILKIN, DULANEY & GOLDEN, and Mr. J. C. ROBINSON, for appellee; that a judgment will not be reversed because of an improper instruction, if other instructions fairly present the case, cited Warren v. Dickson, 27 Ill. 115; Elan v. Badger, 23 Ill. 498.

Verdicts in cases of torts should not be disturbed unless they are grossly erroneous, or the result of passion or prejudice: City of Ottawa v. Sweely, 65 Ill. 434; Fish v. Roseberry, 22 Ill. 288.

The verdict should stand, if there is evidence to support it even though the evidence might, in the opinion of this court, justify a different result: T. W. & W. R. R. Co. v. Moore, 77 Ill. 217; C. & A. R. R. Co. v. Shannon, 43 Ill. 338.

BAKER, J. This was an action on the case for slander brought by the appellee against the appellant in the Clark Circuit Court. The venue was changed to Crawford county, where a trial was had before the judge and a jury, and a verdict returned in favor of appellee for \$2,000 damages. A motion for a new trial was made by appellant and overruled by the court, and judgment was rendered upon the verdict.

The case is brought to this court by appeal, and several errors are assigned.

The trouble between the parties seems to have grown out of a church difficulty, which difficulty ripened into a chancery suit and injunction, wherein Moore was complainant and Duncan and others were defendants. In this chancery suit appellee made an affidavit, in which he stated, among other things, that he had been acting as sexton of the church since August, 1871, and that during all that time he never, as an individual nor as sexton, refused E. B. Moore the use of the church, but always opened it and lighted it up when directed by said Moore to do so, and that during the four years E. B. Moore never furnished a stick of wood for fuel. Appellant afterwards

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charged that appellee had sworn falsely in this affidavit, and hence this suit for slander.

To the declaration filed the appellant pleaded "not guilty," and several pleas of justification averring the truth of the matter charged by him and the falsity of the affidavit; issues were formed on these pleas.

It is assigned for error that the verdict of the jury is contrary to the evidence and contrary to the law and instructions of the court, and that the court erred in overruling the motion for a new trial.

No point is made but that the speaking of one or more of the sets of actionable words stated in the declaration was proven. The real controversy in the case arises upon the special pleas. The court instructed the jury that the appellant, in order to prevent a recovery by the appellee, was only bound to show by a preponderance of the evidence that there were statements made in the affidavit, and to which the pleas applied, that were false, and that it made no difference whether Mauk knew they were untrue or not, and that if the affidavit sworn to by Mauk was in fact false in any one or more of its said statements, then the defense of justification was made out.

We have carefully examined all the evidence in the record bearing upon these pleas, and find that as to at least two of them the weight of the evidence is clearly and greatly in favor of appellant. Three witnesses, Samuel Rusk, Hayden Dougherty and appellant, testify positively to the fact that appellant did furnish wood for the church in the fall of 1874. Nor do we regard the statement of Mr. Walmsley and of appellee that Moore furnished Wood in December, 1875, as at all in conflict with the testimony of appellant and the witnesses who support him, and more especially so when we take into consideration the statements of appellant that he furnished wood at various other times before and after the injunction.

Upon the question as to whether Mauk had ever refused Moore the use of the church, we have upon the one side the testimony of the appellee himself, corroborated, if it can be regarded as corroborated at all, but slightly by the evidence of

one single witness, and upon the other side the positive testimony of Joseph Comstock and appellant, strongly corroborated by the evidence of ten other witnesses, including three witnesses introduced by appellee himself; this, even though we adopt the theory of appellee, that there is a distinction between refusing appellant the use of the church and refusing to let him have the key to get into the church. But it does appear to us that the refusal of the key under the circumstances as detailed by most of these other witnesses, was tantamount to a refusal of the use of the church, and if it is to be so regarded, then appellee is in direct conflict with some nine or ten witnesses when he claims that he never refused Moore the use of the church.

When the evidence is conflicting, courts are always loth to disturb the verdict of a jury; yet even where there is some evidence both ways, if the finding of the jury is manifestly against the weight of the evidence, the verdict will be set aside. *Reynolds v. Lambert*, 69 Ill. 495; *St. Paul F. and M. Ins. Co. v. Johnson*, 77 Ill. 598.

Even in actions *ex delicto*, courts will interfere with the verdicts of juries in order to prevent manifest injustice. *Smith v. Slocum*, 62 Ill. 354; *I. C. R. R. Co. v. Chambers*, 71 Ill. 519.

It is also assigned for error in this case that the damages are excessive. Even if appellee was entitled to a verdict, there can be no question under the evidence in this case but that appellant believed that the affidavit was false, and that he was sincere and honest in speaking of it as false, and that the conduct and language of appellee himself engendered such honest belief. If it appears that the defendant, though he cannot fully justify, had reason to believe from the defendant's own conduct that the charge was true, then such fact is in mitigation of damages. *Sedgwick on Damages*, 541.

If the pleas were unproved, yet the filing of said pleas would not be, under the circumstances of this case, proof of malice. *Rev. Stat. Ch. 126, § 3*; *Hawver v. Hawver*, 78 Ill. 412.

The fifth instruction given for appellee is complained of. That instruction is in part inartificially drawn, but as it would

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not probably mislead the jury, we would not reverse on that account.

We are of opinion that the verdict of the jury in this case is against the weight of the evidence, and contrary to the law and the instructions of the court, and that the damages are excessive, and that the court erred in overruling the motion for a new trial, and in rendering judgment upon the verdict. The judgment is reversed and the cause remanded.

Reversed and remanded.

ALLEN, J., took no part in the decision of this case.

THE ST. LOUIS, VANDALIA & TERRE HAUTE RAILROAD
COMPANY

v.

ARTHUR M. DAWSON ET AL.

1. SERVICE UPON A CORPORATION.—The statute provides that service may be made upon a corporation by leaving a copy of the summons with the president, secretary, etc., if either can be found in the county; if not, then by leaving a copy of the summons with any director, clerk, etc., of such company found in such county. These constitute two classes, and service upon one class is primary to service upon the other; and before service upon persons of the second class will confer jurisdiction upon the courts, it must appear affirmatively that service could not be had upon persons in the first class.

2. WHAT RETURN SHOULD SHOW.—The return of the officer should show that the president of the company did not reside in or was absent from the county; only in that contingency does the statute authorize service on an agent.

3. VOID JUDGMENT.—The return in this case not showing proper service upon defendant, the judgment is void.

APPEAL from the Circuit Court of Effingham county; the Hon. JOHN H. HALLEY, Judge, presiding.

MESSRS. GILMORE & WHITE, and Mr. JOHN G. WILLIAMS, for appellant; argued that there was no proper service of the process upon appellant, and the judgment was obtained without

notice or appearance, and appellant is entitled to the relief sought, and cited Owens v. Ranstead, 22 Ill. 161; McGehee v. Gold, 68 Ill. 215.

Messrs. Wood Bros., for appellees; contending that the service was properly made, cited Leshar et al. v. Wabash Navigation Co. 14 Ill. 85; Hinde et al. v. Wabash Navigation Co. 15 Ill. 72; C. St. P. & F. D. L. R. R. Co. v. McCarthy, 20 Ill. 385; O. & M. R. R. Co. v. Dunbar, 20 Ill. 623; C. & R. I. R. R. Co. v. Whipple, 22 Ill. 106; R. R. I. & St. L. R. R. Co. v. Wells, 66 Ill. 321.

TANNER, P. J. The appellant filed his bill to restrain a constable from levying an execution which he then held, upon its property. A temporary injunction was granted, but on a final hearing of the cause the injunction was dissolved, and the bill dismissed.

It appears that the judgment upon which the writ issued was obtained against the appellant in a proceeding of garnishment, as a creditor of one Gilfoil. The appellant did not appear and resist the proceedings, which resulted in the rendition of the judgment, at any stage. The returns of the officer, indorsed upon the summons in garnishment and upon the *scire facias*, to make the conditional judgment final, were in these words: "Served by reading and leaving a copy with C. B. Wade, agent of said company," with the difference that the return of service upon the *scire facias*, styles the company the "St. L., V. & T. H. R. R. Co." These returns show no service upon appellant. The proceedings were had in January, 1877, and the service, in order to have given the justice jurisdiction, should have been made in conformity to the requirements of the 21 Sec. Chap. 79, R. S. 1874. It provides that incorporated companies may be served by leaving a copy of the summons with the president, secretary, superintendent, general agent, cashier or principal clerk, if either can be found in the county in which the suit is brought. If neither shall be found in the county, then by leaving a copy of the summons with any director, clerk, engineer, conductor, station agent, or any agent of such company found in the county.

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The statute of 1853, providing for service upon incorporated companies, is substantially the same as the act under which these proceedings were had. The former statute was construed in this respect by the Supreme Court in the *St. L. A. & T. H. R. R. Co. v. Dorsey*, 47 Ill. 289. There the court says: "The return, to have been good under the act of 1853, should have shown that the president of the company did not reside in, or was absent from the county. Only in that contingency does the statute authorize service on an agent." In the case before us the returns of the officer are vitiated by the same fault or omission. The statute has divided the officers, agents and employees of incorporated companies into two classes, and service upon one class is primary to service upon the other, and before service had upon those of the second class can give the courts jurisdiction, it must appear affirmatively that service could not be had upon those persons embraced in the first class, on account of the existence of the causes for which the statute authorizes service upon the persons embraced in the second class.

We think by reason of the similarity of the statutes of 1853, and the statutes now in force in reference to the character of service upon incorporated companies, the decision of the Supreme Court in *Dorsey's* case is decisive of the one before us, and we must hold accordingly. The record presents another question of some magnitude, and upon argument a decision was pressed, but as the case must be reversed and the injunction made absolute, for the cause already mentioned, and as the rulings of the court are authority only so far as they are directory, in cases which may be reversed and remanded for further proceedings, we deem it inadvisable to pass upon the question.

The judgment rendered against the appellant was rendered without service, and is therefore void, and the Circuit Court on the hearing should have made the injunction absolute.

The cause is therefore reversed and remanded, with directions to the Circuit Court to make the injunction absolute.

Reversed.

EDWARD HARPSTRITE

v.

H. G. VASEL.

1. CONSTRUCTION OF WRITTEN AGREEMENT.—A written agreement in relation to the sale of certain property excepted a mortgage of \$600, the payment of which was assumed by the party promising. *Held*, that the exception as to the mortgage was not of the amount, but merely descriptive of the mortgage, and that an accumulation of \$300 interest on said mortgage was included in the term mortgage.

2. SET-OFF.—V. & Co. executed a written agreement to S. for the payment of money, which was assigned to H. After executing this agreement, V. & Co. sued S. and her husband on an account due from S. and obtained judgment. In an action by the assignee of the agreement against V. & Co. *Held*, that the judgment against S. and her husband could not be set off.

APPEAL from the Circuit Court of Madison county; the Hon. AMOS WATTS, Judge, presiding.

Mr. J. H. YAGER, for appellants; that by pleading to a declaration after overruling a demurrer, a party waives his demurrer, cited *Walker v. Welch*, 14 Ill. 277; *McFadden v. Fortier*, 20 Ill. 509.

A purchaser of land, receiving a warranty deed and entering into possession, cannot retain possession and lawfully refuse payment for the land: *Laforge v. Mathews*, 68 Ill. 328.

A note payable on demand is not overdue until payment has been demanded and refused: *Stewart v. Smith*, 28 Ill. 397.

Mr. C. P. WISE, for appellee; that the verdict not being manifestly against the weight of evidence, will not be set aside, cited *Aurora F. Ins. Co. v. Eddy*, 55 Ill. 213; *City of Peru v. French*, 55 Ill. 317; *Lawrence v. Hagerman*, 56 Ill. 68; *Kuhnlen v. Blitz*, 56 Ill. 171; *Ill. Cent. R. R. Co. v. Dunning*, 59 Ill. 192; *Walker v. Martin*, 59 Ill. 348; *Young v. Shorling*, 60 Ill. 148; *Keller v. Rossbach*, 61 Ill. 342; *T. P. & W. R. R. Co. v. Hobble*, 61 Ill. 388; *Bishop v. Busse*, 69 Ill. 403.

The instrument is not negotiable, and suit cannot be maintained in the name of the assignee: *Smalley v. Edey*, 15 Ill.

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324; Gillilan v. Myers, 31 Ill. 525; Kingsbury v. Wall, 68 Ill. 311.

The deed given to appellee by Mrs. Schwendeman was void: Cole v. Van Riper, 44 Ill. 58; Bressler v. Kent, 61 Ill. 426.

Under the rule of court, the motion for new trial was made too late, and such rule must be observed: Prindeville v. The People, 42 Ill. 217.

ALLEN, J. This was a suit brought by appellant against appellee to the October term, 1877, upon the following instrument:

“ALTON, ILL., May 14, 1877.

“We, the undersigned, promise hereby to deliver to Mrs. Mary Schwendeman, or order, on demand, merchandise to the amount of three hundred and eighty-nine (389.20), provided she gives us full possession of property described in deed filed in Hillsboro, and bill of sale in our hand, and further guaranteed the title and possession of the same clear, except the mortgage of (\$600) six hundred dollars in favor of Mess. Harpstrite & Shlaudeman, Decatur, otherwise this agreement shall have no power and shall be void.

“\$389.20.

H. G. VASEL & Co.”

Which had been assigned by Mary Schwendeman to appellants before the commencement of the suit.

The declaration contained one special count on the instrument and the common counts.

Appellee filed pleas “general issue;” 2d. Set-off that Mary Schwendeman was indebted to plaintiff on open account in the sum of \$238.75; 3d. Plea of payment; 4th. Total failure of consideration, except as to \$1.

Issue on pleas and trial by jury and verdict for appellee.

Motion for new trial overruled, and judgment for appellee for costs.

Several errors are assigned by appellants, but we deem it important to notice but two. The first, that the court erred in admitting improper evidence to go to the jury; second, that the verdict of the jury was contrary to the law and evidence.

The record shows that the instrument sued on was executed

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by appellee and his deceased partner to Mary Schwendeman, in part consideration of the sale of a house and lot in Hillsboro, sold by her to appellee; that the title was in her; that she executed warranty deed to appellee, and that appellee took possession under deed, and that he has peaceably enjoyed possession ever since.

Appellee set up as a ground of partial failure of consideration that he had bought the property mentioned in deed and referred to, and some chattels amounting to \$100, in value, of Mary Schwendeman; that the entire consideration was \$1,300; that this instrument sued on was for a balance due on the purchase after deducting an account which she was owing him of \$203.75; another note which he gave at the same time for \$100, taxes paid (\$7.05), and \$600 to be paid on mortgage on property described in deed, amounting in all to the sum of \$1,300, and insists that the consideration has failed in this: that he was to have the house and lot free from all incumbrances by the terms of the contract, except \$600, the amount of mortgage on the same; and that he, by the terms of the contract, was not liable to pay any interest that had accrued or might thereafter accrue on the mortgage; that \$300 interest had accrued on mortgage and was an incumbrance on the land, and that herein the consideration had failed, except as to the \$1, and that the chattels were purchased at same time the house and lot was purchased.

On the other hand, it is insisted that the purchase price of the house and lot was \$1,300, and that the personal property bought at same time was \$100, altogether \$1,400, and that appellee was to lift the mortgage of \$600 on the house and lot. A bill of sale of the personal property was taken by appellee from Mary Schwendeman and her husband for the personal chattels, dated May 7, 1877, for the consideration of \$100. The consideration expressed in the deed, made on a different date, is \$1,300.

Anton Schwendeman, husband of Mary, testified that he made the contract, and that the true consideration in the deed was \$1,300; that the personal goods were \$100, making total, \$1,400; that at the time deed was made there was about \$100

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interest due on mortgage, and that when trade was made appellee assumed to pay the mortgage and interest, and that the \$600 and \$100 interest was deducted from the price of land and personal property.

Anton Schwendeman is corroborated in his statement, both by the deed and bill of sale, so far as the consideration expressed in them is concerned, and we think appellee has not sustained his plea of partial failure of consideration, either as to interest accrued on the mortgage or as to the real consideration for the sale of house and lot and personal property.

As to appellee's set-off for goods furnished Mary Schwendeman after the instrument sued on was made by appellee, it is sufficient to say that appellee, in his testimony, admits that for those items of goods furnished Mrs. Schwendeman he had sued her and her husband jointly, and had obtained a judgment against them, so that his debt was, before the commencement of this suit, merged in judgment. If so, then no action could be maintained on this account, nor could her account be set-off in a suit against him. *Warren v. McNulty*, 2 Gilm. 35; *Wayman v. Cockran*, 35 Ill. 152; *Runamaker v. Corday*, 54 Ill. 103.

This suit was wrongly brought, but we have in furtherance of justice regarded it in the light in which it was tried by both parties in the circuit court.

The written contract says, "except the mortgage (\$600) six hundred dollars in favor of Mess. Harpstrite & Schlaudeman, Decatur," thus specifically pointing out and identifying the incumbrance that was excepted. The contract did not specify the interest of that mortgage or the principal of that mortgage, as being excepted, but it designated the mortgage, and the mortgage included the whole mortgage, both principal and interest.

The court instructed the jury for appellee, that if they believed from the evidence that appellee gave the agreement sued on, agreeing by said agreement to pay said \$389.20 in merchandise if the incumbrance upon the land did not amount to more than \$600; then, if the jury also believed from the evidence that instead of being only \$600 due on the mortgage on said land, there was due in addition, as interest, the sum of

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\$102.60, then that appellee was entitled to a credit of \$102.60, the court thus informing the jury that this written agreement was in effect a guarantee that the incumbrance upon the land did not amount to more than \$600. We do not so interpret it, and in our opinion the court erred in giving the instruction indicated.

We regard the verdict of the jury as manifestly wrong; that the court erred in giving the instruction indicated, and in not granting a new trial, and in rendering judgment for appellee.

This cause is reversed and remanded.

Reversed and remanded

JAMES H. WILSON, Receiver,

v.

HERMAN G. WEBER.

1. **MOTION TO DISSOLVE INJUNCTION—AFFIDAVIT FOR CONTINUANCE.**—An affidavit for continuance of a motion to dissolve an injunction should "satisfy" the court, that the whole or some material part of the answer is untrue; that the complainant has testimony by which he can prove it to be untrue; and that since the coming in of the answer he has had no opportunity to procure such testimony. These requirements are not met by a mere negation; the court must be satisfied of the existence of these several facts, the names of witnesses, etc.

2. **ENJOINING COLLECTION OF TAX—PAYMENT OF LEGAL TAX.**—A person seeking to enjoin the collection of a tax on the ground that a part is unauthorized, should show by his bill, as nearly as possible, what part is just and what part unauthorized; and he should be required as a condition of relief to pay such amount as is just.

3. **DISMISSING BILL WITHOUT A FINAL HEARING.**—Where the allegations in a bill are such, that if established, relief would be granted, the bill should be retained until a final hearing is had, and it is error to dismiss the same on a motion to dissolve the injunction.

4. **ASSESSMENT OF DAMAGES—FEES FOR ATTORNEY-GENERAL—FACTS ON WHICH ALLOWANCE IS MADE.**—The solicitors for the defendants were the Attorney-General and State's Attorneys of the several counties whose collectors were restrained. *Held*, that so far as shown, those officers were rendering *ex-officio* service, and an allowance for such service finds no warrant in the statute. A failure to show in the record the testimony upon which the allowance was made, is fatal to the decree assessing damages.

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APPEAL from the Circuit Court of St. Clair county; the Hon. WM. H. SNYDER, Judge, presiding.

Mr. BLUFORD WILSON and Mr. J. M. HAMILL, for appellant; That the offer of complainant to prepare sufficient affidavit for continuance was within the requirements of the statute, and the court should have granted a continuance, cited Rev. Stat. 1874, Chap. 69, § 18; Shirwin v. The People, 69 Ill. 58; Cole v. Choteau et al. 18 Ill. 441; St. L. & S. E. R'y Co. v. Teters, 68 Ill. 146.

Illness of counsel is good cause for continuance: Jarvis v. Sherlock et al. 60 Ill. 379.

It is improper to allow evidence contradicting an affidavit for continuance: Supervisors Fulton County v. M. & W. R. R. Co. 21 Ill. 368; Wick v. Weber, 64 Ill. 168.

Where answer and replication have been filed and the cause is heard on the pleadings without proof, it is error to dismiss the bill: Cummins v. Cummins, 15 Ill. 34; Parkinson v. Truesdale, 3 Scam. 370; Davis v. McVickers, 11 Ill. 327; Hummert v. Schwab et al. 54 Ill. 147; Brockway v. Rowley et al. 66 Ill. 99.

It was error to dismiss the bill on motion to dissolve the injunction: Maher v. Bull, 39 Ill. 538; Parkinson v. Truesdale, 3 Scam. 370.

Under the prayer for general relief a court of chancery may decree that which is not specifically prayed for: Isaacs v. Steel, 3 Scam. 97.

The county clerk cannot add delinquent real estate tax to the tax on personal property: Rev. Stat. 1874, Chap. 120, §§ 129, 229, 172, 188, 182, 185, 190, 191, 194, 195, 197, 199, 203, 226.

An injunction will be granted to restrain the collection of a tax fraudulently levied: Viele v. Thompson, 77 Ill. 625; Town of Lebanon v. O. & M. R'y Co. 77 Ill. 539; McConkey v. Smith, 73 Ill. 314; C. B. & Q. R. R. Co. v. Cole, 75 Ill. 592.

Where it is impossible to distinguish the legal from the illegal tax, the whole should be enjoined until evidence can be

taken upon that point: *Taylor v. Thompson*, 42 Ill. 17; *Briscoe v. Allison*, 43 Ill. 296.

As to the power of the collector to distrain for personal taxes: *Rev. Stat. 1874, Chap. 120, § 137; Laws of 1873, 45, § 1.*

There is no lien upon real property for the tax levied on personal property: *Schaeffer v. The People*, 60 Ill. 181; *Parks v. Miller*, 48 Ill. 364.

An answer in chancery should state facts and not conclusions of law: 2 *Daniel's Ch. Pr.* 814; *Stone v. Moore*, 26 Ill. 172; *Craig v. The People*, 47 Ill. 493.

The revenue law relating to assessment of capital stock is limited to companies created under the laws of this State: *W. U. Tel. Co. v. Leib*, 76 Ill. 172.

Consolidation of companies organized in different States does not constitute the same legal entity in both States: *O. & M. R'y Co. v. Wheeler*, 1 Black. 247; *R. & M. R. R. Co. F. L. & Tr. Co.* 49 Ill. 331; *So. Car. R. R. Co. v. Charleston*, 2 Otto, 667; *Central R. R. Co. v. Georgia*, 2 Otto, 665.

Laws imposing taxes are strictly construed in favor of the taxpayer: *Dwarris on Statutes*, 742; *Cooley on Taxation*, 202; *United States v. Wigglesworth*, 2 Story, 369; *Chestnutwood v. Hood*, 68 Ill. 132.

The capital stock tax is not a tax upon shares of stock, but upon the property of the corporation: *State Tax on Railroad Cases*, 2 Otto, 575; *Porter v. R. R. I. & St. L. R. R. Co.* 76 Ill. 561; *Republic Life Ins. Co. v. Pollack*, 75 Ill. 292; *C. B. & Q. R. R. Co. v. Cole*, 76 Ill. 591.

The jurisdiction of the taxing power is limited to persons and property within the limits of the State: *Cooley on Taxation*, 15; *State Tax on Foreign-held bonds*, 15 Wall. 300.

A tax upon the property of a company by valuation cannot be sustained: *Delaware Railroad Tax Case*, 18 Wall. 207; *Porter v. R. R. I. & St. L. R. R. Co.* 76 Ill. 561.

A tax assessed upon property exempt from taxation may be restrained by injunction: *C. B. & Q. R. R. Co. v. Cole*, 76 Ill. 591.

What property is subject to assessment is a matter of law, and the assessor has no discretion: *Porter v. R. R. I. & St. L.*

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R. R. Co. 76 Ill. 561; Republic Life Ins. Co. v. Pollack, 75 Ill. 292.

The listing and valuation must be made in the manner and within the time required by law: Blackwell on Tax Titles, 106; Cooley on Taxation, 256; Town of Lebanon v. O. & M. R'y Co. 77 Ill. 541; Marsh v. Supervisors Clark County, Cent. Law Jour. Dec. 14, 1877, 509; Schuttler v. Fort Howard, 6 Cent. Law Jour. 68.

The court erred in assessing damages and awarding \$800 attorneys' fees to the Attorney-General and State's attorneys: Constitution, Art. 5, § 23; Rev. Stat. 1874, Chap. 53, § 1.

Evidence as to assessment of damages on dissolution of the injunction must be preserved in the record: Hamilton v. Stewart, 59 Ill. 331; White v. Pearce, 47 Ill. 415.

The damages are grossly excessive: Terry v. Hamilton School, 72 Ill. 478; Jevne v. Osgood, 57 Ill. 346; Elder v. Sabin, 66 Ill. 128; Collins v. Sinclair, 51 Ill. 330.

Mr. JAMES K. EDSALL, Att'y-Gen., for appellee; that the motion for continuance was properly overruled, it being a matter resting in the discretion of the court, and there being no affidavit filed in support of it, cited Rev. Stat. 1874, 581, § 18; Vickers v. Hill, 1 Scam. 307; Mitchell v. Chicago, 40 Ill. 174; Woodruff v. Tyler, 5 Gilm. 458; Harmison v. Clark, 1 Scam. 131; Smith v. Powell, 50 Ill. 21.

After replication is filed the cause is deemed at issue and stands for hearing: Rev. Stat. 1874, 201, § 29; Gregg v. Brown, 67 Ill. 526.

When a cause is heard upon bill, answer and replication, only such portions of the bill as are admitted by the answer can be taken as true: Harris v. Reeve, 5 Gilm. 131; Selby v. Geines, 12 Ill. 69.

And where the answer denies the allegations of the bill, they must be supported by proof: DeWolf v. Long, 2 Gilm. 679; Trenchard v. Warner, 18 Ill. 142; 1 Barb. Ch. Pr. 141; Munson v. Miller, 66 Ill. 380; Thomas v. Adams, 59 Ill. 223.

The action of the State Board of Equalization in assessing the capital stock, property and franchises of appellant was valid:

Porter v. R. R. I. & St. L. R. R. Co. 76 Ill. 561; Republic Life Ins. Co. v. Pollack, 75 Ill. 292; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; State Railroad Tax Cases, 2 Otto, 575; Huck v. C. & A. R. R. Co. Sup. Ct. Ill. 1877; C. B. & Q. R. R. Co. v. Siders, Sup. Ct. Ill. 1877.

The Statute makes it the duty of the State Board to assess the rolling stock, track, etc., in the various counties along the line of the road, and the Board assumed to assess property within its jurisdiction. There was no such irregularity as would warrant the intervention of a court of equity: Rev. Stat. 865; Cook county v. C. B. & Q. R. R. Co. 85 Ill. 460; Jenks v. Board of Supervisors, etc. 65 Ill. 271.

Complainant should have shown what part of tax, if any, was legal, and tendered payment of the same: Merrill v. Humphrey, 34 Mich. 170; State Railroad Tax Cases, 2 Otto, 616.

The assessment of damages on dissolution of the injunction having been made after the bill was dismissed and appeal prayed, the appeal from the decree dismissing the bill does not bring up this subsequent order: McWilliams v. Morgan, 70 Ill. 551; Freeman v. Freeman, 66 Ill. 54.

TANNER, P. J. This was a suit in equity, instituted in the Circuit Court of St. Clair county. A temporary injunction was granted, by which the collectors of revenue in the several counties named in the bill were restrained from distraining and selling the personal property belonging to the St. Louis and Southeastern Railway company (consolidated) for certain taxes assessed and levied against its real and personal property for the years 1873 and 1874. On the 24th day of October last an answer was filed to the bill and a motion was entered to dissolve the injunction. The motion was set down for hearing on the 31st day of the same month, by order of court. When the day arrived for hearing, and the motion was called up, the solicitor for the company moved to continue the motion to dissolve the injunction, and proposed to prepare and immediately present an affidavit showing that certain material parts of the defendant's answer were untrue, and also that he had testimony which would disprove all the material parts of the answer speci-

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fied, which he could produce at the next term of the court, or at an earlier day; and that he had no opportunity to procure such testimony since the coming in of the answer. And further, that the senior counsel of the railway company, and who had drawn the bill for the injunction, was unable to be in court by reason of sickness in his family. On this statement the court refused to continue the motion to dissolve the injunction, but a hearing was then had on the motion, the injunction was dissolved, and the bill dismissed. A suggestion of damages was then filed, and the court, after hearing evidence touching the same, decreed that the defendant in the suit have and recover \$800 for attorneys' fees.

The railway company brings the case to this court, and assigns the following errors: First, the court erred in overruling the motion for a continuance, and urges with much earnestness that in offering to present the affidavit in support of his motion for a continuance, the company brought itself within the provisions of section 18, chapter 69, R. S. 1874. This section provides: "If, after a motion is made to dissolve an injunction the complainant in the bill will satisfy the court by his own affidavit, or that of any disinterested person, that the answer or any material part thereof (to be specified in such affidavit) is untrue, and that he has testimony which will disprove the answer, or such material part thereof, which he can produce at the next term of the court, or at an earlier day, and that he has had no opportunity to procure such testimony since the coming in of the answer, the court may grant a continuance of such motion until the next term, or until such testimony can be produced."

It is insisted on behalf of the appellant that under the rulings of the Supreme Court in *Cole v. Choteau*, 18 Ill. 441; *Shirwin v. People*, 69 Ill. 58, and *The St. Louis and Southern Railway Company v. Teters*, 68 Id. 146, a continuance of the motion to dissolve the injunction was imperative upon the Circuit Court. These authorities hold that in applications for continuances, where parties bring themselves clearly within the provisions of the statute, a denial of the right would be error. The soundness of this view cannot be questioned, but the inquiry is, did

the appellant bring itself within the rule laid down by these authorities; or, rather, did it bring itself within the provisions of the aforementioned statute? The answer to this inquiry must be drawn from the facts presented by the record.

It appears the appellant was actually present in court when the motion was entered, and the time for its hearing fixed by order of the court; and therefore could not have been surprised at its call for hearing. The answer of the appellees had been on file, and the motion to dissolve known to the appellant one week before its hearing and the dissolution of the injunction. When the solicitor for the appellant asked for time to prepare and file an affidavit in support of his motion, he did not give or attempt to give any cause for not having his affidavit ready. But he insisted that he had a right to claim the indulgence of the court for this purpose for the space of one-half of an hour, under a rule of the court, which is as follows: "After a case is called for trial, thirty minutes shall be allowed to prepare and file an affidavit for a continuance unless under special circumstances, to be judged of by the court. Whenever time is asked and given to prepare an affidavit for continuance, the case shall not lose its place for trial." This rule, even if it should be thought applicable to motions of this nature, does not necessarily suspend the power of the court to require litigants to proceed to trial at once upon the call of the docket. Under special circumstances the court may refuse to allow the time ordinarily given by the rule. This right is reserved in the rule, and nothing short of an unwise and oppressive administration of it can give cause for complaint. The appellant, however, insists that this was done in this case. That "by offering to immediately prepare and file an affidavit, showing that all the material parts of the defendants' answer were untrue," it was simply exercising a right conferred by the 18 Sec. Chap. 69, R. S.

This assumption must rest upon two grounds: first, that the appellant had not by *laches* forfeited the right to delay the motion; and, second, that the proposition embodied all that the statute required in such an affidavit. We think the first ground was wholly swept away by the facts already noticed, but never-

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theless, we will briefly notice the second. The affidavit required by the statute before cited must "satisfy" the court, first, that the whole or some material part of the answer is untrue; second, that the complainant has testimony by which he can prove it to be untrue; and third, that since the coming in of the answer he has had no opportunity to procure such testimony.

These exactions of the statute are not answered by simply negating the truth of the allegations of the answer, and affirming the existence of testimony by which they can be disproved, and a want of opportunity since the coming in of the answer to procure such testimony. The court must be satisfied of the existence of these several facts before a continuance of the motion can be allowed. How can conviction be wrought in the mind of the court without a presentation of facts? The solicitors of appellant did not state to the court by what character of evidence he expected to disprove the answer, or where it existed—whether any and what portions were matter of record; what part, if any, was to be established by witnesses, their names and residence. Neither did he state any facts by which the court could become satisfied that no opportunity was given after the coming in of the answer to procure such testimony. The rule in regard to an application for the continuance of a motion to dissolve an injunction is not less rigid than the rule at law. *Smith v. Powell*, 50 Ill. is in point.

The statement of the appellant was not sufficient if it had been offered in the form of an affidavit, as it did not present any facts to satisfy the court, as the statute requires. Again, the appellees were restrained from collecting the public revenue for the years 1873 and 1874, in all the counties through which the appellant's railroad passes, while they admitted a liability to pay a portion of the taxes, the collection of which was enjoined; and alleged only as a reason why payment had not been made, that "the tax assessed on the real estate of the company for the years 1873 and 1874, in the several counties, is so mixed and confounded with the tax on personalty, that it is impossible to discriminate between them, and determine the amount extended against the real estate."

The bill, however, does not allege facts which, to our minds, show that it was impossible to determine the amount of taxes to be paid by the company on its real estate. If this fact can be determined by the court on a hearing of the cause, it would be determined by proof; but the bill does not allege any reason why the facts which would amount to such proof were not attainable without the aid of the court. A property owner seeking to enjoin the collection of taxes, on the ground that a part is unauthorized, should show by his bill, as near as may be practicable, what part is just, and what is unjust and unauthorized, and he should pay to the proper officer that part which he concedes to be properly chargeable against him. And where he seeks to enjoin the collection of taxes under such circumstances, he must be required, as a condition of relief, to pay such amount as is just. *Merrill v. Humphrey*, 24 Mich. 170; *Railroad Tax Cases*, 93 U. S. S. C. R. 616; *Mills v. Johnson*, 17 Wis. 598; *Taylor v. Thompson*, 42 Ill. 10. The principle in the authorities enunciated, lies at the threshold of a court of equity. The force of these authorities is fully appreciated by the appellant, and the rule they establish not denied. But it is persistently urged that the bill presents a case not within the rules. We cannot think so. The court, on the hearing of the motion to dissolve the injunction, had the right to look into the bill in this regard, in connection with all the facts presented by the record; and in denying to appellant time to prepare and present an affidavit as proposed, and in dissolving the injunction, did not indiscreetly exercise its power, in view of the provisions of the statute and the rule of court cited.

It is also insisted that it was error to dismiss the bill upon the dissolution of the injunction. The record does not, as stated by appellees, show that the issues presented by the bill and answer were submitted to the court at the time the motion to dissolve the injunction was heard. The decree recites: "And the cause coming on to be heard upon complainant's bill, answer and replication thereto, upon a motion to dissolve the temporary injunction heretofore granted, and the court being now fully advised in the premises, it is ordered, adjudged and decreed that the injunction be, and is hereby, dissolved, and the

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complainant's bill dismissed at his cost." This decree does not show that the cause was submitted, and to be heard upon bill, answer and replication, with the motion to dissolve the injunction. The bill was not framed wholly with a view to obtain an injunction. It also alleges, among other things, that the board of equalization, in assessing the capital stock of appellant, included some proportional part of the franchises of the corporation as vested in it by the legislatures of Indiana, Kentucky and Tennessee. That said board added together the market or fair cash value of the consolidated capital stock, and the market or fair cash value of the consolidated debt, excluding current expenses, and from the aggregate amount so obtained, deducted the amount of the tangible property, and took the amount remaining to be the fair cash value of the capital stock, including the franchise; thereby including the value of the franchise, not only in Illinois, but in Indiana, Kentucky and Tennessee, and the tangible property in the same States, and the value of the debt (excluding current expenses) in the same States.

If these allegations are true, property not subject to taxation in Illinois have been made the subject of taxation by the board of equalization. Hence, although the preliminary injunction was properly dissolved, yet upon a final hearing, if these allegations should be established, relief would be granted, and, if necessary, a perpetual injunction awarded. The appellant may, from *laches*, or other causes, have been unable to procure a continuance of the motion to dissolve the injunction, yet upon the call of the cause for trial, may have been ready to sustain his bill by proof.

These allegations would seem to bring the appellant within the jurisdiction of a court of equity, and demand relief, according to the case of the Chicago, Burlington and Quincy Railroad Company v. Cole et al, 75 Ill. 591. Hence, the bill should have been retained until a final hearing. This rule of chancery practice is so well settled that a reference to the authorities by which it is established is unnecessary.

It is further urged that the court erred in assessing damages to the appellee of \$800 for solicitors' fees. The solicitors were the Attorney General and the State's attorneys of the several

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counties whose collectors were restrained. These solicitors were, so far as is shown by the record, rendering ex-officio service and an allowance for such service finds no warrant in the statute. And further, the record fails to furnish the testimony upon which the allowance was made. This omission is fatal to the decree assessing damages. *Hamilton v. Stewart, et al.* 59 Ill. 331; *White et al. v. Pearce et al.* 47 Ib. 415. We are of opinion the Circuit Court erred in dismissing the bill, and in allowing the appellees \$800 as fees for the services of the Attorney General and the several State's attorneys, and also in rendering a decree against the appellants for all costs. For these several errors the decree of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

ILLINOIS AND ST. LOUIS RAILROAD AND COAL COMPANY

v.

FRIDOLIN DECKER.

1. **TRESPASS—MEASURE OF DAMAGES—LOSS OF PROFITS.**—In actions of tort, where the amount of profits of which the injured party is deprived as a legitimate result of the trespass, can be shown with reasonable certainty, such profits, to that extent, constitute a safe measure of damages, and so far as they are plainly traceable he should receive compensation for them; but such damages must be the necessary and natural consequence of the act. Profits which are merely probable and speculative cannot be recovered.

2. **PROSPECTIVE PROFITS AS DAMAGES—RULE IN ESTIMATING.**—Where it is sought to recover for the loss of profits in any trade or business, the evidence must afford the jury some data from which they can with reasonable certainty determine the loss of profits. No fixed, certain guide for estimating such damages can be established.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. KOERNER & TURNER, for appellant; contending that trespass is the remedy for injuries, committed by force, cited 1

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Chitty's Pl. 143; 1 Waterman on Trespass, 1; 3 Blackstone's Com. 123.

Damages of a speculative character cannot be recovered: Green v. Williams, 45 Ill. 206; Cilley v. Hawkins, 48 Ill. 308; Olmstead v. Burk, 25 Ill. 86; Williams v. Chicago Coal Co. 60 Ill. 149.

Mr. JAMES M. DILL and Mr. W. C. KUEFFNER, for appellee; that a recovery can be had for probable profits, cited Chapman v. Kirby, 49 Ill. 219; Benton v. Fay, 64 Ill. 422.

An erroneous instruction is not ground for a reversal if the evidence shows that the verdict was right. Hall v. Sroufe, 52 Ill. 421; 49 Ill. 451; 56 Ill. 22.

The trespass was willful and the jury were warranted in giving punitive damages. Johnson v. Kamp, 51 Ill. 220.

TANNER, P. J. The appellee brought an action of trespass in the St. Clair Circuit Court, and averred in his declaration that he leased from the appellant a certain house situated on the bank of the Mississippi river for the period of one year, beginning on the 1st day of April, 1876, for the sum of \$600. That the appellant reserved from the lease two rooms of the house for passenger rooms. That he took possession of the house in accordance with the terms of the lease, and put therein a lot of furniture, saloon fixtures, wines and liquors, of the aggregate value of \$1,000, and kept a saloon until the committing of the grievances alleged. That on the 10th day of April, 1876, and until the institution of the suit, the appellant was the owner of a steam ferry-boat on the river aforesaid; and that on that day, with force of arms, drove and propelled said boat against the house of appellee with great force and violence, and thereby caused said house to fall into said river; by which his property was lost and destroyed and his business broken up. That at the time his profits amounted to \$200 per month, and would have been worth that sum per month until the end of his lease. To this declaration the plea of not guilty was interposed, issue joined thereon, the cause submitted to a jury, and a verdict returned in these words: "We, the jury,

find for the plaintiff, and assess his damages for his loss of property and his loss of profits for the unexpired term of his lease, at \$700."

The appellant moved the court for a new trial. The motion was overruled and judgment rendered against him for the amount of the verdict, and the case is brought to this court by appeal.

The errors assigned are:

1. The admission of improper testimony in behalf of appellee.
2. The exclusion of proper testimony offered on the part of the appellant.
3. The giving of improper instructions to the jury in behalf of the appellee.
4. The refusal to give instructions asked by the appellant.

We think an examination of the first and third alleged errors will dispose of the cause.

The appellee was introduced as a witness, and after he had testified that he leased the building from appellant for one year at fifty dollars per month; that he took possession according to contract on the 1st day of April, 1876, and kept a saloon for the sale of liquors in the house until the 5th of May, following, and the value of liquors and other property destroyed by the alleged tortious acts of appellant, he was asked: "What were your profits, as far as you had gone, per month, clear from all expenses?" he replied that he made about \$75 the first month. To this question and the answer the appellants made objections, but the court overruled the objections and permitted the testimony to go to the jury.

The latter clause of the first instruction given on the part of the appellee is as follows: "And the jury may allow such further sum as they believe from the evidence the plaintiff would probably have realized as profits from said business during the remainder of the term."

From a careful consideration of the doctrine upon which this evidence was conceived to be admissible, we have not been able to coincide with the Circuit Court. The rule as laid down in *Chandler v. Allison*, 10 Mich. 460, seems now to be well

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established, and is so well expressed that we adopt the language of the court: "It may now be assumed to be the general rule that in actions of tort, where the amount of profits of which the injured party is deprived as a legitimate result of the trespass can be shown with reasonable certainty, such profits to that extent constitute a safe measure of damages, and so far as it is plainly traceable he should make compensation for it. To this extent the recovery of a sum equal to the profit lost, while plainly within the principle of compensation, is also within the limits which excludes remote consequences from the scale in which the wrong is weighed."

The Supreme Court of our own State, in *Green v. Williams*, 45 Ill. 206, which was an action for breach of covenant, brought by a lessee against a lessor, the court remarks: "The plaintiff is entitled to recover all expenses necessarily incurred by her in consequence of the defendant's refusal to give possession; but she is not entitled to profits that she might have made by conducting her business on the demised premises; such damages are remote, speculative, and incapable of ascertainment. The case of *Cilley v. Hawkins*, 48 Ill. 308, was very similar to this, and the same rule was there announced. The case of *Benton v. Fay & Co.* 64 Ill. 417, was an action for a breach of contract by the non-delivery of mill machinery which occasioned the mill to remain idle. The court, in awarding a new trial, directed the Circuit Court to receive no evidence, on another trial, of probable profits, as they would be purely speculative. The case of *Chapman v. Kirby*, 49 Ill. 24, relied on to justify the rulings of the court in the case at bar, was an action on the case brought to recover damages for the wrongful withdrawal of steam power from the machinery of the plaintiff. The use of the power was to be continued by the contract for five years, and it had been enjoyed for three years when the wrong complained of was done; on the trial the court instructed the jury "that, if they found for the plaintiff, in estimating his damages they could consider the nature and extent of his business at the time the power was withdrawn, the amount of business he had done during the six months previous." This instruction was approved by the Supreme Court, in the following language:

“This was an action on the case, and not on contract. In all actions of tort, the amount of damages sustained, and in case, all of the consequential damages sustained, connected with or flowing from the act complained of by the plaintiff. But the damages must be the necessary and natural consequence of the act. They must be real, and not merely speculative or probable. And of what does this loss consist but of the profits that would have been made had the act not been performed by appellants? and to measure such damages the jury must have some basis for an estimate, and what more reasonable than to take the profits for a reasonable period next preceding the time when the injury was inflicted?”

From the rule as established by the authorities above cited we reach the conclusion that while in actions of tort the plaintiff is entitled to recover for all damages suffered, yet where it is sought to recover for the loss of profits in any trade or business, the evidence must afford the jury some data from which they can with reasonable certainty determine the loss of profits. The rules of law do not, and perhaps cannot fix any certain guide for the estimate of such damages; and hence the courts can but at best approximate a correct standard. The most reliable authorities agree with our court in *Chapman v. Kirby*, that a recovery cannot be had for profits which are merely probable or speculative.

The question then arises: When are profits probable or speculative, and at what point, or more accurately speaking, upon what character of evidence do they lose the quality of being probable and speculative, and become sufficiently certain to constitute a basis upon which they can be calculated? In *Chapman v. Kirby*, the owners of the planing mill had been in the use of the steam power and engaged in their trade and business over three years; and this we think ample time to establish a settled course of business, from which they, plaintiffs, could very readily establish, by proof, a reasonably certain measure of profits, by the month or by the year. The court, in order to arrive at the prospective profits, instructed the jury that to determine this they might take into consideration the extent of the plaintiff's business for six months next preceding the

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commission of the injury. This ruling of the court was without doubt sound, both upon the authority of well adjudicated cases, and upon reason. In the case at bar the appellee was engaged in keeping a liquor saloon. The lease was to continue for twelve months, and the appellee enjoyed it for one month, and for this period of time his profits were about \$75. From the profits of one month—one-twelfth part of the time—the jury were told, by the admission of this testimony, they might calculate profits for the eleven succeeding months. Distinct periods of time are not and cannot be taken, in this case, by which comparisons can be made.

A month is adopted as a standard where but one has elapsed. Certainly this could not be adopted as a measure which could with reasonable certainty guide the jury in the calculation of profits. The law, while being administered by the courts for the redress of wrongs, must not be made an instrument for the infliction of wrong. While tort feasons should be made to respond in damages to the full extent of their wrongs, some reasonable standard must, at least, be approximated for their ascertainment. They ought not to rest merely in conjecture and probability. Any rule less accurate than this would convert the law into an engine of wrong and oppression.

The testimony in regard to profits should not have gone to the jury.

The next assignment of error which we shall notice is the giving of the instruction in reference to probable profits. The jury were told that in assessing damages they could take into consideration such profits as the appellee would have probably realized from his business if he had been permitted to carry it on to the extent of his lease.

This instruction sent the jury into the fields of conjecture and speculation to determine the amount of damages they should give appellee. This rule has not only no warrant in law, but is in direct antagonism with both the text-writers and the adjudications of our own Supreme Court. Sedg. on Dam. 82; Shear. and Redf. on Neg. sec. 599; Chapman v. Kirby, *supra*; I. B. & W. R. R. Co. v. Barney, 71 Ill. 391. But, should we be considered as trenching upon the rights of the jury in holding

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that the Circuit Court erred in admitting the testimony in reference to profits, still it is clear that the cause must be reversed for this instruction given to the jury.

The judgment of the Circuit Court must be reversed and the cause remanded.

Reversed and remanded.

MILICAN ARNOLD ET AL.

v.

ELIZABETH FRANKLIN.



1. PROMISSORY NOTE—WANT OF CONSIDERATION—GIFT.—A note executed and delivered as a gift, is without a valuable consideration, and will not support an action either at law or equity.

2. SERVICE OF CHILD AFTER MAJORITY.—The mere fact that a child lives with her parents after reaching majority, raises no obligation to pay for services thereafter rendered as a member of the family, and such services cannot be presumed to constitute a consideration for a note given long after.

ERROR to the Circuit Court of Clay county; the Hon. JOHN H. HALLEY, Judge, presiding.

Messrs. HAGLE & FINCH, for plaintiffs in error; that the note was simply a gift and cannot be enforced, cited 1 Parsons on Contracts 201; 2 Kent's Com. 618; Pope v. Dodson 58 Ill. 360; Blanchard v. Williamson, 70 Ill. 652.

Even if given for services rendered long before, it is an imperfect gift; the intention of the father was never carried into effect, and his estate is not liable: Freeman v. Freeman, 65 Ill. 106.

The husband was not a competent witness in favor of his wife: Rev. Stat, 1874, 488; Crane v. Crane, 81 Ill. 165.

TANNER, P. J. This cause was submitted to a jury at the October term, 1877, of the Clay Circuit Court.

The appellee sought to recover against the executors of the last will and testament of Carter Arnold, deceased, the amount

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of a promissory note executed by the testator, on the 8th day of November, 1876, for \$200, and payable one day after date, for value received.

The jury returned a verdict for appellee, and assessed her damages at \$211.30. The appellants moved for a new trial, but the court overruled the motion and rendered judgment upon the verdict in favor of the appellee and against the appellants for two hundred and eleven dollars and thirty cents and costs. The appellants bring the cause to this court by appeal, and assign for error the giving of an improper instruction to the jury on behalf of the appellee, and the refusal to give the third instruction asked for on behalf of appellants. That the verdict of the jury was against the evidence, and a new trial should have been given to the appellants.

All these assignments of error we think are well taken. The evidence upon which the judgment rests is as follows:

General Howard Franklin testified: Know the parties; knew Carter Arnold in his lifetime. He was my mother's father. (Note handed to witness, and he asked about the execution thereof.)

Grandfather was at our house the day of the last presidential election, and staid over night; at about four o'clock the following day, while I was at the barn, he (Carter Arnold) called me to the house. I went. He was sitting on the bed (being in poor health), and my father and mother were in the room, Grandfather said he wanted me to write him a note. He dictated the note and I wrote it. He told me to sign his name to the note, and I did so, and he made his mark.

On cross-examination stated: Do not know of grandfather getting anything for the note.

Note offered in evidence and read to the jury:

"November 8, 1876. I promise to pay Elizabeth Franklin the sum of two hundred dollars, due one day after date, for value received.

"CARTER ARNOLD."

William J. Franklin testified: "Am the husband of plaintiff." Witness objected to by defendant as incompetent. Objection overruled; exceptions taken. Witness then testified:

"Carter Arnold came to our house the day of last presidential election; staid over night. The next day in the afternoon, the old man said he wanted to give Elizabeth something, but that he did not then have any money by him, but he would give her a note for \$200. She said, 'No, father, you need not mind doing that.' He replied, 'Yes I will;' and he went to the door, called my son in, told him to write a note. He asked, 'What for?' The old man made no reply. He then dictated and my son wrote the note, and he handed it to her (plaintiff). He did not say for what purpose he wanted to give her the \$200. My wife, the plaintiff, staid at home with her father after she was of age, until she was twenty-five years old, before she and I were married; that was some twenty odd years ago."

Upon this evidence the court gave, against the objection of the appellants, to the jury the following instruction: "The court instructs the jury, that if you believe, from the evidence, that the deceased, Carter Arnold, gave the note in question in consideration of services rendered by his daughter before marriage, you should find for the plaintiff, and assess her damages at the amount of the note with interest at six per cent. from due."

The appellants then asked the court to instruct the jury, "that the mere fact that the plaintiff resided with her father after she was of age does not make him liable for her services during such time, unless the proof shows that it was in pursuance of a contract or at his request."

This instruction was refused, and the appellants excepted to the ruling of the court. The evidence fails to establish a contract, either express or implied, to pay for services rendered by appellee to the deceased. There is no evidence tending to show an express agreement to pay for services, and the mere fact that a child lives with parents after reaching majority raises no obligation to pay for services thereafter rendered as a member of the family, and therefore such services cannot be presumed to constitute a consideration for the note in suit. *Freeman v. Freeman*, 65 Ill. 106.

The testimony shows clearly that the father desired to make a gift to the appellee of money, but having no money on hand he

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executed and delivered the note as a gift. The note therefore was executed and delivered without a valuable consideration, and will not support an action either in law or equity. 2 Kent, 438; 2 Pars. B. & N. 54; Blanchard v. Williamson, 70 Ill. 652.

The court erred in giving the instruction for appellee, and refusing to give the third instruction asked for by appellants, and should have set aside the verdict of the jury and allowed a new trial.

For the several errors indicated the judgment of the Circuit Court must be reversed and the cause remanded.

Reversed and remanded.

JACOB B. REUTCHLER, use, etc.,

v.

AUGUST C. HUCKE.

1. SET-OFF.—Defendant claimed a set-off against plaintiff's claim, for taxes paid by him at the request of plaintiff, but it not appearing that the defendant had paid the taxes, in any manner, or that he had become legally liable therefor, the set-off should not have been allowed.

2. AGREEMENT TO PAY TAXES OF ANOTHER.—On grounds of public policy no arrangement can be made between the collector and property owner, whereby the owner, or the property, can be discharged from liability by merely marking the taxes paid on the tax books.

3. SET-OFF AGAINST AGENT.—Where one deals with an agent, knowing the agency, he cannot set off a claim due him from the agent against a debt due the principal.

ERROR to the Circuit Court of St. Clair county; the Hon. AMOS WATTS, Judge, presiding.

Mr. CHARLES W. THOMAS, for plaintiff in error; that the defendant could not be allowed a set-off for taxes which he had not paid—only promised to pay—cited Pitzer v. Harman, 8 Blackf. 112.

An obligation to pay is not the same as actual payment, though in some cases the giving of negotiable paper has been so considered: Smalley v. Edey, 19 Ill. 207; Cunning v. Hackley, 8 Johns. 202.

Where one deals with an agent, knowing his agency, he cannot set off a claim due him from the agent, against a debt due to the principal: *Waterman on Set-off*, § 267; *Wharton on Agency*, § 466

Messrs. HAY & KNISPEN, for defendant in error; that plaintiff's second instruction was properly refused, because it was not based on the evidence, cited *Lawrence v. Jarvis*, 32 Ill. 305; 43 Ill. 147; 53 Ill. 419.

When a principal is not disclosed, and the agent contracts for himself, the principal can only claim subject to the equities applicable to the agent: *Wharton on Agency*, 405; *Koch v. Willi*, 63 Ill. 144; *Wheeler v. Reed*, 36 Ill. 81.

Persons dealing with an agent, supposing him to be principal, can take advantage of any set-off against the agent: *Wharton on Agency*, 465; *Koch v. Willi*, 63 Ill. 144.

If a principal permits an agent to act as if he were principal, he will be subject to any set-off against the agent: 2 *Parsons on Contracts*, 251; *Waterman on Set-off*, 321; *Stinson v. Gould*, 74 Ill. 80.

Where a person becomes bound to the payment of money for another, payment by negotiable paper or securities will be considered equivalent to payment in cash: *Ralston v. Wood*, 15 Ill. 159; *Gillilan v. Nixon*, 26 Ill. 50; *Cox v. Reed*, 27 Ill. 434; *Wilkinson v. Stewart*, 30 Ill. 48; *Jewett v. Palmer*, 7 Johns. Ch. 65.

Whether payment was intended is a question for the jury: 2 *Greenleaf's Ev.* 519.

Defendant is still liable to the city for the balance unpaid: *Coons v. The People*, 76 Ill. 383.

A demand against the plaintiff assigned to the defendant before commencement of suit, may be set off, although he has not paid for the same: *Everitt v. Strong*, 5 Hill, 163.

Agreement by a grantee to pay a prior incumbrance may be enforced against him: *Rawson's Adm'r v. Popland*, 2 Sandf. 251; 3 Barb. Ch. 166.

An obligee in a bond is not obliged to first pay the indebtedness, in case of failure of the obligor to perform, before bringing suit: *Pierce v. Plumb*, 74 Ill. 326.

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Actual transfer of the debt in a banker's book with knowledge and consent of both debtor and creditor is equivalent to payment: *Eyles v. Ellis*, 4 Bing. 112.

BAKER, J. This was an action of assumpsit, prosecuted by Jacob B. Reutchler, who sued for the use of the People's Bank of Belleville, against August C. Hucke. The declaration contained the common counts. The defendant filed the general issue, and gave special notice that he would prove on the trial that before the suit was commenced he paid, laid out and expended for plaintiff, at his special instance and request, \$1,250, the said sum being so paid by defendant for the taxes of plaintiff, due by him to the city of Belleville for the year 1874, and that defendant would set off said sum against the amount claimed in the declaration. The case was submitted at the January term, 1878, of the St. Clair Circuit Court, to a jury, and the jury returned a verdict in favor of the plaintiff, and assessed his damages at \$298.49. The plaintiff thereupon moved the court for a new trial, which motion was overruled by the court, and judgment rendered upon the verdict. The plaintiff excepted to the ruling of the court in overruling the motion for a new trial, and brought the case to this court on a writ of error.

There are several errors assigned on the record. Among these are that the court erred in refusing to give plaintiff's second instruction; in giving the instruction hereinafter referred to, and in overruling the plaintiff's motion for a new trial.

The evidence shows that the defendant purchased from plaintiff a bill of nails amounting to \$1,017.

In reference to the matter of set-off referred to in the special notice, the defendant Hucke testified upon the trial substantially as follows: "I was city tax collector of Belleville prior to 1876. Before that time Reutchler told me to mark his taxes paid when I settled with the city, and when I wanted my money I should come to him and get it. This was done two years in succession. I marked the tax books paid. Afterward Reutchler refused to pay me, and I bought these nails to get my money. I paid the city part of this tax. I settled with the

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city, and I owe the city part of it yet. I am responsible to the city for it. The total amount of the taxes was \$718.51. I offered Reutchler his tax receipts, and he refused them. He said he wouldn't pay his taxes. I have settled with the city, and Mr. Reutchler is discharged as far as the city is concerned. The city has the tax books."

Upon cross-examination he stated: "Reutchler came to me and told me he wanted me to pay his taxes in March, 1874. I was collector in 1875 and 1876. I didn't know that Reutchler would not pay me the taxes. It was after that I wanted a settlement with him. He put me off. I am to pay his taxes, and therefore I won't pay those notes. There has been an understanding that I am not to be bound unless I get the money out of Mr. Reutchler. I have paid over \$100 of these taxes into the city treasury. How much over \$100 I cannot say. I don't know whether I can say I have paid the money. I paid over all the money I collected and \$100 more. That which I have not collected I have not paid, except about \$100. I guess I have to pay the money yet. I only remember Mr. Reutchler refused to pay his taxes, and he owes them to me, and that is all I can remember distinctly."

In reference to this same matter of taxes Reutchler testified: "Some time in the early part of 1875 I went to Mr. Hucks and told him to make out my tax receipts and lay them by, and when I got ready I would pay them. I never told Mr. Hucks to pay my taxes. The year before he had made out my receipts and laid them by, and when I got ready I paid them. I never gave Hucks any authority to pay my taxes, and my property is still liable for it. I paid the tax in 1874. It was in 1875 I told Hucks to make out my receipts. I never paid Hucks this claim, nor did I pay any of the city taxes in 1875. They were considered illegal."

G. A. Willey testified that he was a member of the city council, and on the committee on collector's report; that there was no particular agreement about the taxes, but that the understanding with Hucks was that Hucks was to pay when he collected, if he did collect; that they were to remain a charge against Hucks in that way until he collected of Reutchler if

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possible; that there was no resolution or ordinance, and that the council took no formal action that he recollected.

The court instructed the jury as follows:

"If the jury believe, from the evidence, that plaintiff told defendant to pay his taxes, and that defendant did pay his tax, or settled the same with the city, so as to make him legally and absolutely liable to the city for them, prior to the commencement of this suit, and has proved the amount so paid or settled by a preponderance of evidence, they, the jury, should allow defendant a credit on any claim plaintiff may have proved against defendant, if any has been proved."

To the giving of this instruction plaintiff excepted.

The jury allowed the plaintiff's claim for nails, \$1,017, and the whole of defendant's set-off for taxes paid, \$718.51, and returned a verdict for the plaintiff for the balance, \$298.49.

The set-off should not have been allowed. Hucks has not paid this \$718.51, either in money, property, negotiable paper or securities, or in any manner whatsoever, to the city. All that he has done is to make out the tax receipts, and mark the taxes paid on the tax books. He merely states that he paid over all the money he collected and about \$100 in excess; but his own testimony, regarded as a whole, rather rebuts any presumption that he paid this excess specifically as a payment on Reutchler's taxes. Moreover, he states himself that he is not to be bound for the taxes unless he gets the money out of Reutchler. The set-off is for money paid for plaintiff, and we are unable to gather from the evidence that he has ever made payment in any mode. Even if the agreement was that Hucks was to pay the taxes, yet he has never done so, and the agreement made has not been executed by either party. 2 Greenl. Ev. § 519 et seq.; Smalley v. Edey, 19 Ill. 207; Ralston et al. v. Wood, 15 Ill. 171.

If the city has ever received these taxes, it is difficult to see from the evidence when, how and from whom it received them.

The above instruction given by the court was wrong, and it should not have been given, and it probably misled the jury. In it the jury was told that if the defendant settled the tax

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with the city, so as to make himself legally and absolutely liable to the city, then the plaintiff was liable to defendant, thus leaving the jury to determine the question of law as to what constitutes a legal and absolute liability. When Reutchler refused to pay the taxes Hucke should have destroyed the receipts, and erased the entries of payment on the tax books, and proceeded to make the money out of Reutchler's property. The law designates what funds tax collectors shall receive in payment of taxes, and they are not authorized to receive either the promissory notes or verbal promises of the taxpayer in payment. If there is any legal liability on the part of Hucke to the city, which point we are not called upon to determine, it grows out of his own disregard of duty. At all events, he has never paid these taxes to or settled them with the city.

On grounds of public policy, no arrangement can be made between the tax collector and the property owner, whereby the collector can, by merely marking the taxes paid on the tax books, discharge either the owner or the property from liability. If these taxes ever were a valid charge against either the plaintiff or his property, they still continue such, unless discharged otherwise than by the facts here in proof.

An objection is also urged by the plaintiff in error to the ruling of the court, in refusing the second instruction asked by him. There can be no doubt of the correctness of the proposition, that where one deals with an agent, knowing of the agency, he cannot set off a claim due him from the agent against the debt due to the principal. This suit was instituted by Reutchler in his own name simply. Afterward, by leave of the court, the style of the cause was changed, so that he could prosecute still in his own name for the use of the bank. If Reutchler was agent and his principal was disclosed, then it would seem that this case would not be included in one of any of those classes of cases where suit can be brought in the name of the agent. Wharton on Agency and Agents, Ch. 14, § 428 et seq.

The theory of the instruction asked is inconsistent with the theory that the legal cause of action is in Reutchler. We are of the opinion that the plaintiff has no right to complain of the action of the court in refusing to give this instruction.

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As the court erred in giving the instruction first referred to herein, and in overruling the motion for a new trial, the judgment of the Circuit Court is reversed, and the cause remanded.

Reversed and remanded.

HANNAH B. BLAISDELL

v.

JOHN H. SMITH ET AL

1. VENDOR'S LIEN—RESERVATION IN DEED—NOTICE.—A vendor may reserve in a deed, a lien which he can enforce in equity against subsequent purchasers and incumbrancers. A deed containing a description of the notes given for the purchase money, and a recital in the habendum clause, "To have and to hold on the payment of the notes hereinabove stated," is a sufficient reservation of a vendor's lien, and the recitals sufficient to put a reasonable person upon inquiry as to the payment of the notes mentioned.

2. DEED—RECITAL—HABENDUM.—There is no rule requiring a recital to appear in particular portion of a deed. The habendum clause is a part of the deed.

3. PAYMENT OF MORTGAGE—LAPSE OF TIME—PRESUMPTION.—After the lapse of twenty years, in the absence of any proof to the contrary, a mortgage will be presumed to have been satisfied.

4. ENFORCING LIEN BY ASSIGNEE OF NOTE.—When a vendor's lien is reserved in a deed, the right to enforce such lien passes to the assignee of the note executed for the purchase money.

APPEAL from Alton City Court; the Hon. HENRY S. BAKER, Judge, presiding.

Mr. J. H. YAGER, for appellant; that the word assigns in a deed means any person to whom the property may in the future be assigned, cited 1 Burrill's Law Dic. 103.

An agreement that the title shall not vest till the purchase money is paid, is a mortgage: 2 Washburn on Real Property, 61.

A purchaser is charged with notice of facts recited in a deed under which he claims: *Croskey v. Chapman*, 26 Ind. 333; *Case v. Bumstead*, 24 Ind. 429; *Melross v. Scott*, 18 Ind. 250; 1 Story's Eq. Jur. § 401; 2 Leading Cases in Equity, 36.

The mortgage and note is barred by the Statute of Limitations, more than sixteen years having elapsed since their maturity: 1 Scates, Treat & Blackwell's Stat. 751, § 4.

Where the consideration of a note is a deed for land, with covenants against incumbrances, a mere breach of those covenants does not constitute a failure of the consideration of the note: Cassell v. Ross, 33 Ill. 245; Willetts v. Burgess, 34 Ill. 494; Laforge v. Matthews, 68 Ill. 328.

Mr. JOHN W. COPPINGER, Mr. JOHN J. BRENHOLT, and Mr. CHARLES P. WISE, for appellees; contending that a vendor's lien is not looked upon with favor, it being a secret lien, cited Richards v. Leaming et al. 27 Ill. 431.

A vendor's lien is not assignable: Markoe et al. v. Andras, 67 Ill. 34; Wing v. Goodman, 75 Ill. 159.

ALLEN, J. A bill was filed in the City Court of Alton by complainant against defendants to enforce a vendor's lien on certain lots situated in the city of Alton, for the amount of a promissory note for \$300, and accrued interest on the same, which she held as assignee of Moses G. Atwood.

Upon a hearing in that court the prayer of the bill was denied, and the bill dismissed with a decree against complainant for costs. Exception was taken by complainant to the decree of the court, and by agreement the cause was brought to this court on an agreed state of facts.

Complainant introduced in support of her bill a conveyance from Moses Atwood and wife (to certain lots in the city of Alton, described in the deed) to John H. Smith, dated April 27, 1857, which was acknowledged and recorded on the 18th day of June, 1857.

The consideration expressed in the deed is \$400 cash, and two notes of \$800 each, bearing date even with the deed; the first payable fifteen months after date, and the second thirty-two months after date, each drawing eight per cent. interest per annum, payable annually; and in habendum to the deed, the following words: "To have and to hold on payment of the notes herein above stated, the above granted premises," etc.

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Complainant then introduced the note bearing date April 27, 1857, for \$800, payable to the grantor in the deed with eight per cent. interest, signed by the grantee in the deed.

It was further admitted that said note had been duly indorsed to the complainant by the payee, Moses G. Atwood, subsequent to the conveyance to other defendants hereinafter mentioned, and that the principal sum and about two years' interest on the same was yet due and unpaid.

It was further admitted that Smith, the grantee in the deed from Atwood and wife, conveyed the premises to James Valentine and A. G. Smith on 30th December, 1859, and that in June following Valentine and Smith conveyed to Elizabeth Smith, wife of John H., and that these deeds were duly recorded.

That Elizabeth Smith, after she acquired title, executed a mortgage on a part of the premises to Thomas Biggens to secure the payment of a promissory note for \$1,000, dated March 13, 1867, and that said note was unsatisfied when this suit was brought.

That afterward, on the 1st day of December, 1875, a fee bill issued from the Supreme Court in a case wherein Elizabeth Smith was a defendant, and was levied on said lots described in deed from Atwood and wife to Smith, and that the same were sold, and that Henry Watson became the purchaser at said sale, and that said Watson, at the time this bill was filed, held a certificate of purchase for the same, and that after said sale Elizabeth Smith executed and delivered to said Watson a deed for the said lots.

That on the trial below John H. Smith was introduced as a witness for defendant, and testified that at the time he purchased said lots of Atwood, Atwood informed him that there was a mortgage on the lots, but that the debt was paid, and that he, Smith, could pay interest on second note till mortgage was satisfied of record.

That after complainant got this note he notified husband of complainant of the existence of the mortgage.

It is further admitted that Atwood, and Blaisdell, husband of complainant, both died more than four years before the commencement of this suit.

This suit was brought to the February term, 1877.

It is insisted by complainant in the bill that this note is made by the deed from Atwood to Smith, a vendor's lien upon the premises conveyed; that this lien attached from the making and delivery of the deed, and that it is a prior lien to any subsequent purchaser or incumbrancer, and that by the indorsement of the note to complainant by the payee, she became entitled to enforce the lien and collect the note out of the proceeds of a sale of the land.

Defendants controvert this, and insist that no vendor's lien attached by reason of anything contained in the deed.

That complainant acquired no right to enforce a vendor's lien on the premises as the assignee of Atwood.

That defendants are not chargeable with notice of any vendor's lien by reason of anything appearing in the deed from Atwood to Smith.

That a vendor may reserve in a deed a lien that he may enforce in a court of equity against subsequent purchasers and incumbrancers, is no longer a controverted question.

Whether any such lien is reserved in the deed of Atwood to Smith must depend upon what the deed itself contains.

The note held by complainant is particularly described in the body of the deed as forming a part of the consideration of the deed.

Again, in the habendum we find it referred to in the following language: "To have and to hold on the payment of the notes herein above stated," etc.

If these statements in the deed, when recorded, are sufficient to put subsequent purchasers upon inquiry as to whether the notes for the purchase money are paid, then they cannot claim that they are innocent purchasers without notice.

The lien of a vendor takes effect against the vendee, his heirs and privies in estate, and against subsequent purchasers who have notice that the purchase money remains unpaid. Purchasers are bound to take notice of all liens shown to exist by the vendor's deed, and subsequent purchasers will not be regarded as innocent purchasers if such notice of the lien exists as would put a reasonable man upon inquiry. Washburn on Real Property, 89.

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A recital in a deed that a part of the purchase money remains unpaid, is notice to the extent of the sum so recited. *Ib.* 89. Story Eq. Jur. § 401.

This deed with its recitals was of record, and these defendants are charged with notice of whatever it contained. 26 Ind. 333.

This court is of opinion that the statements in the deed were sufficient to put a reasonable man upon inquiry. *Case v. Busteed*, 24 Ind. 426; *Melross v. Scott*, 18 Ind. 250; 26 Ind. 333.

It is insisted that defendants are not chargeable with notice of anything that may appear in the "habendum"; that it is no part of the deed; that the conveyance would be good without it. If it were true that what appears in the habendum they were not bound to notice, still we hold that the description of the note in the body of the deed, with the statement that it constituted a part of the consideration, would be sufficient to charge them with notice under the authorities above cited. But the court is not aware of any rule or decision that requires the recital to appear in any particular part of a deed. The habendum clause is a part of the deed.

Again, it is insisted by defendant that the note itself ought to show that it was a lien on the land sold. The note is private property; the law does not require it to be recorded; how, then, could any stipulation in the note itself be notice to subsequent purchasers, unless it was recorded, or had been exhibited to the purchaser? We think this objection is not well taken.

Defendants insist that this lien should not be enforced, because there was a mortgage on this property when Smith purchased of Atwood. The evidence tends to show that that mortgage was due at the date of sale, and that it had been satisfied, but not released of record. More than twenty years had elapsed before this suit was brought. The law raises the presumption that it was satisfied, and in the absence of any proof tending to show the contrary, the court will regard it as satisfied.

The only additional question raised by the defendant is, can the complainant, as assignee of the vendor, enforce this lien?

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When a vendor's lien is reserved in a deed, the right to enforce that lien passes to the assignee of the note executed for the purchase money. *Carpenter v. Mitchell*, 54 Ill. 126; *Craskey v. Chapman*, 26 Ind. 333.

In the habendum of this deed defendants were notified that Smith, the grantee, was "to have and to hold on the payment of the notes above stated," etc., showing that the lien for the payment of the notes was expressly reserved.

Regarding this note as an express lien reserved in the deed, the decision of the city court must be reversed, and the cause remanded.

Reversed and remanded.

THE ST. LOUIS, VANDALIA AND TERRE HAUTE RAIL-ROAD COMPANY

v.

THE TOWN OF SUMMIT.

1. **TRESPASS QUARE CLAUSUM—WHEN MAINTAINED—POSSESSION.**—In order to maintain the action of trespass *quare clausum*, the plaintiff must be in possession of the premises, except in cases where the land is unoccupied, and there is no adverse possession.

2. **HIGHWAYS.**—Where the *locus in quo* was a National road, the fee being in the State, the town having only the care and superintendence of it and the duty of keeping it in repair, there is no such possession as will enable the town to maintain this action. No such possessory right in a road exists in a corporation.

3. **PRACTICE—PLEADING—DISTINCTION BETWEEN TRESPASS AND CASE.**—Although the statute has abolished the technical distinction between these forms of actions, it does not affect the substantial rights of the parties, so as to operate to give any other remedy for acts done than such as before existed; nor does it abrogate the well settled rule that the proofs must correspond with the allegations. If the declaration is trespass *quare clausum fregit*, then there must be a possession in order to support it.

4. **DAMAGES—EVIDENCE AS TO.**—By its charter, appellant was only bound to restore the highway in such a manner as not to impair its usefulness, and it not appearing how appellant was in any way bound to repair the bridge in question, it was error to admit evidence of how much it would probably cost to repair the bridge. Damages which necessarily result from the

3	155
54	699
3	155
78	379
3	155
82	373
3	155
89	643

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injury complained of, may be shown under the *ad damnum*, but special damages must be specifically set forth in the declaration.

APPEAL from the Circuit Court of Effingham county; the Hon. JOHN H. HALLEY, Judge, presiding.

Messrs. GILMORE & WHITE and Mr. JOHN G. WILLIAMS, for appellant; argued that the town had no such possession as would support the action, and cited Connor v. President, etc. 1 Blackf. 88; Panton Turnpike Co v. Bishop, 11 Vt. 198; City of Champaign v. McMurray, 76 Ill. 353.

As to the measure of damages: Murphy v. City, 23 Wis. 365; Abbott v. Mills et al. 3 Vt. 529.

Mr. WILLIAM B. COOPER and Mr. B. F. KAGAY, for appellee; that the town was chargeable with the duty of keeping the road in repair, cited Troy v. Cheshire R. R. Co. 3 Foster, 103.

The town has such an interest in the road as will authorize a recovery, and if the injury be permanent, the cost of maintaining a new road may be recovered: Troy v. Cheshire R. R. Co. 3 Foster, 103; 4 Cush. 63; 1 Redfield on Railways, 252.

A statute giving railroads the right to pass over highways, does not preclude parties damaged from recovering therefor: Ellicottville Plank Road Co. v. Buffalo R'y Co. 20 Barb. 644.

The right of eminent domain can only be exercised upon making due compensation: 1 Redfield on Railways, 231.

BAKER, J. This is an action of trespass *quare clausum fregit*, prosecuted by the appellee against the appellant. The *locus in quo* is that part of the National or Cumberland road that is located in the township of Summit, in Effingham county.

The case was submitted to a jury at the September term, 1877, of the Effingham Circuit Court, and a verdict was returned into court finding the appellant guilty, and assessing the damages at \$2,000.

Motions for a new trial, and in arrest of judgment were overruled, and a judgment was rendered by the court on the verdict of the jury.

The case is brought by appeal to this court, and numerous errors are assigned.

The National road was laid out and constructed by the general government, under an act of Congress passed in 1820, between Wheeling, in West Virginia, and a point on the bank of the Mississippi river, and so much of the lands of the United States as were included in the road were by said act reserved and excepted from sales of the public lands. In 1856 Congress conveyed and transferred to the State of Illinois so much of the Cumberland or National road as lay within the State of Illinois. U. S. Stat. at Large, 1856, p. 7.

Thus the fee in the road was reserved to the United States by the act of 1820, and conveyed to the State by the act of 1856. The State has never divested itself of the title that it received from the general government, and still continues to be the owner in fee of the road.

The State has, however, from time to time made provision for working and keeping in repair this in common with the other public roads and highways. In 1859 the board of supervisors in all counties under township organization were given entire control of all the State roads in their respective counties. Laws of 1859, 194. Afterward, in 1861, this was changed, and the care and superintendence of highways and bridges therein was delegated to the commissioners of highways of the several towns in all counties under township organization. Thus it appears that in Effingham county, it having been under township organization since a time anterior to the passage of either of these acts, the control and care of the National road was at one time committed to the supervisors of the county, and at another time to the commissioners of highways in the several towns, the state retaining the ownership and fee of the road.

By the act of 1861 it was made the duty of the commissioners of highways "to give directions for the repairing of roads and bridges in their respective towns, and to cause the building of bridges when the public interests or necessity require it, to lay out and establish roads, to regulate the roads already laid out and to alter and vacate roads, and to cause the high-

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ways and bridges which are or may be erected over streams intersecting highways to be kept in repair." Laws of 1861, 246. The same care and superintendence over highways is committed to such commissioners, and the same duties imposed upon them by the act of April 11, 1873.

The first question that arises upon this record is as to whether the plaintiff below had such possession of the *locus in quo* as would enable it to maintain trespass.

The gist of the action of trespass, *quare clausum fregit*, is the injury to the possession, and the general rule is that without actual possession trespass cannot be supported. The English doctrine is, that as to real property, there is no such constructive possession as will enable the plaintiff to support this action. 1 Chit. Pl. 176, 177, and notes.

With us the rule is relaxed, and when the plaintiff is the owner and the lands are unoccupied, or there is no adverse possession, trespass can be maintained. *Dean v. Comstock*, 32 Ill. 173; *Smith et al. v. Wunderlich et al.* 70 Ill. 426.

The title to the National road being in the State, and not in the town of Summit, it is clear that there can be no constructive possession in the town, upon the principle that the possession follows the title when there is no adverse possession. The town, through its commissioner of highways, had merely the care and superintendence of the road, and the duty imposed upon it of keeping it in repair, etc.

The only evidence in the case tending in the least to show actual possession in the plaintiff, was the testimony of several witnesses, who stated that the National road through Summit township had been worked by the road labor in that township, as other highways were worked. We do not understand that this was such possession as would sustain the action of trespass *quare clausum fregit*; in fact, it was a mere performance of the duty imposed by statute upon the town authorities to keep the highways in repair. It has been held that commissioners of sewers could not maintain an action of trespass against commissioners of a harbor for breaking down a dam erected by the former, as such commissioners, across a navigable river, as the authority to be exercised by them on behalf of the public does

not vest in them such a property or possessory interest as would entitle them to maintain such action, and the proprietors of a navigation, having by statute a mere easement or right to use land for the purposes of the navigation, do not acquire such interest in the soil of a bank adjoining to and formed out of the earth excavated from a new channel, made for the first time under the act, as will enable them to maintain trespass. 1 Chitty Pl. and Notes, 176.

The case of Connor v. The President and Trustees of New Albany, 1 Black. 88, was trespass *quare clausum fregit* and seems to be very much in point. The court says: "A street in a town is a public highway. It is a subject of common use, and not of exclusive possession, an incorporeal hereditament, in which all persons possess equal right, the right of passing over it, and is in its nature incapable of being reduced into possession. But it is a subject of government, and the government of it is, by the act regulating the incorporation of towns, placed in the hands of the corporation. They have the power to keep it in repair, to remove nuisances, etc.; but this power is no more than a supervisor possesses over a common highway, and is certainly of a very different nature from a possession, either absolute or qualified. Consequently, no possessory right exists in the corporation, by which the action can be supported." So in the case at bar, the National road is a public highway, the ownership of which is in the State. It is for the common use of all. The public have the right to pass and repass, and it is incapable of being reduced into possession. So, also, said road is the subject of government, and under the control of the State, and the State has, for the time being, imposed the care and superintendence of it upon certain township officers, and has made it their duty to keep it in repair, etc., and has imposed fines and penalties, to be recovered in the name of the town, for obstructing or encroaching upon the same. Rev. Stat. 121, §§ 58, 59, 60 and 61. In this case there is no such possession as will support trespass *quare clausum fregit*; but the remedy in ordinary cases for obstructing or encroaching upon the road would be by suit in the name of the town, for the penalties imposed by the statute.

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But it is urged in this suit that an action on the case would lie, and that the distinction between trespass and case was abolished by our statute before the commencement of this suit. Laws 1871-2, 342.

The Supreme Court say, in the case of *Blalock v. Randall*, 76 Ill. 228: "The statute does away with the technical distinction between the two forms of action, but does not affect the substantial rights and liabilities of parties, so as to operate to give any other remedy for acts done than before existed." We understand the statute to accomplish these objects and these only; to abolish the technical distinction between the two forms of action so that you may join counts in trespass with counts in case, and may call your action trespass or case—it is wholly immaterial which—and may sue out your writ in either form of action, and may then count in either trespass or case, or both, at your option. But your count, if in case, must contain all the elements of a good count in case, or if in trespass, must contain the elements of a count in trespass. The change goes only to the matter of the form of action, and does not change substantial rights and liabilities. Nor do we understand that this statute repeals that old and more than well settled principle, that in all actions the proofs must correspond with the allegations. Where a declaration is filed showing a good cause of action in either trespass or case, it is wholly immaterial whether you call your action trespass or case, but such facts must be alleged as show a legal cause of action in the one form or the other, and the facts that are alleged in the pleading must be supported by the proofs. If the declaration is in trespass *quare clausum fregit*, then there must be a possession in order to support it—either actual, or in case the premises are vacant and unoccupied, a constructive possession that follows ownership and title.

Even if there was in this case such possession as would sustain trespass, it is difficult to see how the plaintiff could recover in such action. The public highways in the State are of general concern, and are fully and completely under the control of the legislature, and in the case of this particular road the fee itself was and is in the State, and the legislature had full power to

make other arrangements in regard to the same, or vacate it or dispose of it as it deemed proper.

It was stipulated in this case that any evidence admissible under a good plea might be admitted under the plea of the general issue. The ninth section of the act amending the act incorporating the appellant provides, among other things, that "Whenever it shall be necessary for the construction of said railroad, to cross any road or highway lying on the route of said road, it shall be lawful for the company to construct their railroad across, upon, or by the side of the same, provided that the said company shall restore the road or highway thus traversed or crossed to its former state, or in a sufficient manner not materially to impair the same in its usefulness." Thus it appears that a license was given to the corporation by the supreme power of the State, and by virtue of that license the company entered upon the National road and constructed its railroad across, upon and by the side of the same, and that by virtue of such license it has continued to operate its railroad across and upon the said road. It is difficult to see why such license is not a full and complete defense to an action of trespass, as appellant of lawful right entered upon and constructed its said road upon said highway.

The attention of the court is called by counsel for appellee to the case of *Ellicottville, etc., Plank Road Co. v. Buffalo, etc. R. R. Co.* 20 Barb. 644. That was an action prosecuted by the plank road company against the railroad company for a trespass committed by entering upon the plank road and for tearing up the plank and grading, etc. The plank road company was a private corporation, duly organized under the laws of the State, and was "in the actual use, occupation and enjoyment of the plank road, toll-gates," etc. The liability in that case is distinctly put upon the ground of the inviolability of private property, "whether belonging to individuals or private corporations." The court say: "The legislature could not give to this railroad company a right to enter upon the plaintiff's road, and in any way to impair its usefulness or diminish its value, without making or becoming liable to make the plank road company just compensation. This statute is construed as

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granting only the right which the public had in these streams of water, water-courses, streets, highways, plank roads, turn-pikes and canals, and not as attempting to grant any right to violate private property without the consent of the owners."

The distinctions between that case and the case at bar are obvious; in that case the plank road was the property of and in the actual use, possession and occupancy of the plaintiff; in this case the plaintiff had no possession and had only the care and superintendence of the highway; in that case the plaintiff was a private corporation with vested rights of property, and in this case the plaintiff is merely one of the political subdivisions of the State, with a mere duty imposed upon it by the State of keeping the highway in repair, and that care, superintendence and duty liable to be taken away and devolved upon others at the legislative will.

Our attention is also called to the case of *The Town of Troy v. Cheshire Railroad Company*, 3 Foster, p. 83. The declaration is in case, and alleges that there was a public highway in Troy leading from Troy toward Keene, and which the town was liable to repair, and that there was upon the highway and forming a part of it, a valuable stone bridge, in good repair and suitable for the accommodation of the public; that the defendant had built a railroad partly upon and over said highway, and did in constructing their railroad cause obstruction and injury to the said highway and to said bridge, by demolishing and destroying the bridge and converting to their own use the material thereof and by erecting upon the site of the bridge a railroad bridge impassable by the public travel, and by occupying with the rails, embankments and excavations of the railroad a part of the highway, etc., and by placing upon said highway a large quantity of stones, and by creating upon the traveled part of the highway a fence, etc., by means of which the highway was narrowed and rendered unsafe, etc.

It will be seen that the case above referred to differs materially from the case at bar as presented by the pleadings; that being an action on the case, alleging no possession by the plaintiff or trespass by the defendant, but alleging the injury complained of according to the real facts of the case. Aside from

the question of damages, which we will hereafter refer to, the only point decided in the case is that towns that are required by law to construct and keep in repair highways and bridges within their boundaries, have a qualified interest in the roadways and bridges that they have erected, and may maintain an action upon the case for the destruction or obstruction of the road, or the conversion of the materials. The case of *Harrison v. Parker*, 6 East. 154, is cited several times in the opinion of the court. In that case Harrison, under a grant of authority from Sir G. Warren, built a bridge on the land of Warren for public use, and covenanted to keep it in repair and not to demand toll. He sued the defendants in trespass, alleging in the first count of the declaration that these defendants broke down and damaged plaintiff's bridge, etc.; and the second and third counts were for similar trespasses. The fourth count was on the *asportavit* for taking and carrying away the goods and chattels of the plaintiff and converting them, etc. At the assizes a verdict was found for the plaintiff. Afterward in the Court of King's Bench it was held that the action might be maintained by the plaintiff on the fourth count for the *asportavit*, as there was a qualified right of property subsisting in the plaintiff after the dedication of the bridge to the public, and that upon severance of the materials of the bridge they returned to him again as his absolute property, so as to enable him to maintain a possessory action for the materials subsisting in the shape of several chattels. Lord Ellenborough, C. J., in delivering his opinion, says: "If it were necessary to decide whether trespass were maintainable by the plaintiff for pulling down the bridge, it might be proper to consider whether any property in the soil had passed to him under the grant, but on the fourth count it is not necessary to decide that question."

In fact, we have been unable to find any case where it has been held that a party with no property in the soil, and not in actual possession or occupancy of a road or bridge, could maintain trespass *quare clausum fregit*, merely upon the ground that such party was charged with the duty of keeping it in repair. We feel clear that the proper common law remedy for an injury would be in case.

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Even were the declaration such as to permit a recovery, the present judgment would have to be set aside and the cause remanded for errors, in admitting improper testimony against the objections of the appellant, and in refusing proper and giving improper instructions to the jury, and for the further reason that the damages assessed by the jury, are altogether excessive and not justified by the evidence in the case.

The facts of the case, as shown by the evidence, are about as follows: The National road was laid off by the general government eighty feet wide, and was graded for the width of thirty feet. The town of Summit has never spent any money in repairing the road, but ordinary road labor has been done upon that part of the road within the town. The appellant constructed its railroad upon the National road for about 800 feet through Ewington, on the west bank of the Little Wabash river; through Ewington the railroad cut is between twelve and eighteen feet deep, and across this cut the railroad company built a bridge for the wagon road; about thirty feet on the north side of the National road was left by the railroad for the use of the public, except for a short distance at or near the bridge. For a very short distance the railroad occupies all or nearly all of the National road. But to obviate the difficulty the railroad condemned or attempted to condemn, and graded a strip of ground north of and parallel with the old road for a road for the accommodation of the public, and to furnish a way from the east edge of Ewington; and also opened a road south of the railroad that leads back to the National road west of the bridge across the railroad cut, these two pieces of road, one on the north and the other on the south side of the railroad, being connected by said bridge.

It appears from the evidence that at the time that the railroad was constructed there was an old bridge across the Little Wabash river on the National road; that the railroad did not touch the National road at either end of the river bridge; that the center line of the railroad was twenty feet south of the line of the National road; that it was about one hundred feet from the railroad to the old bridge, and that the whole width of the public road was open there. This old bridge, from innate

defects and its own weight, fell down about one year after the railroad was built, and there is nothing whatever in the evidence showing or tending to show that the railroad company had anything whatever to do, directly or indirectly, with the destruction of this bridge. It is, however, in evidence that this part of the road was considered somewhat dangerous by some on account of the liability of horses to get frightened at the cars.

Upon the trial, against appellant's objections, the court permitted appellee to ask its witnesses "what it would take to place the road in its old condition, including the bridge, grading and everything," and questions of similar import, but of slightly variant phraseology, and permitted the witnesses to answer, they stating various sums, ranging from \$1,000 to \$5,000. Moreover, the court refused to give the following instruction, which was asked by the appellant: "In determining plaintiff's damages in this case the jury are not to take into consideration the value of the bridge which formerly crossed the Wabash river in Summit township, or what it would take at the time defendant's road was constructed to put said bridge in good repair."

We are wholly unable to perceive how it became the duty of appellant to repair said bridge, it being upon a portion of the National road that was not even touched by its railroad, or upon what theory of law or justice it was liable to pay the value of a bridge for the destruction of which it was in no way accountable, and which it does not appear to have meddled with in the least. We are satisfied that the verdict of the jury for \$2,000 damages was predicated to a very considerable extent upon the opinions of witnesses based upon the supposed value of this bridge. There was error in permitting questions of the character above indicated to be asked and answered, and also in refusing to give the instruction mentioned.

Again, witnesses were permitted, against the objection of appellant, to make estimates of the cost of restoring the National road to the same condition, at the same grade and in the same place as the old one. There was error in this. The appellant had a license from the State to build its railroad across and

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upon the highway, and to maintain it there. The occupation of the appellant was necessarily permanent in its character, and surely it never was contemplated by the legislature, when it required the appellant to restore the highway in a sufficient manner not to materially impair the same in its usefulness, that the appellant would fill up cuts twelve or eighteen feet deep, and thereby cover up its road-bed and tracks to that depth. Nor is it to be supposed that appellee intends to perform any such labor.

We have heretofore seen that, under the statutes of the State, it is the duty of the town to keep so much of this highway as lies within its limits in repair. For this purpose it is authorized to apply the road labor of the township and to assess and collect a road tax. It is also authorized to alter or widen the road, and to have the damages of the owners of the land, if not released or agreed upon, assessed by a jury, and such damages are to be paid by the town, and the town, out of the funds raised for road and bridge purposes, and by availing itself of the road labor of the township, is required to make and pay the expenses of grading and opening the road thus altered or widened. Out of this liability grows the right, if any such right it has, of the town to maintain an action for damages, upon a count properly framed, against the appellant. The damages that it would be entitled to recover, if any, would be measured by its liability, and would be altogether compensatory in their character. In this case, while the railroad company occupies a portion of the public highway under license from the State, yet it was required to restore the highway in a sufficient manner not materially to impair its usefulness. If it has already done this, then it has already performed all that was required of it, and it is not bound to respond in damages to the town. If it has not done so, then the town will have to perform the duty that appellant should have performed, so that the public may safely pass and repass upon the highway, and for any expenses that the town would necessarily incur in procuring right of way, or in opening or grading the new portion of the road so as to make it equally safe and convenient to the old portion, or for any extra expense of keeping in repair the road as remodeled, over and

above the expense of keeping in repair the old road, and for any expense of removing obstructions upon the portion of the old road retained within the new highway, the town would perhaps be entitled to recover as compensation. In this case, the injury and nuisance is necessarily of a permanent character and will continue without change. The continuance of the state of facts produced by the acts of appellant will necessarily follow, as it must be presumed that appellant will continue to occupy such portion of the highway as its road is built upon, and it is a permanent diversion of that property to a new use. The ingredients above mentioned, growing out of the acts of appellant and the liability of appellee, would probably constitute the measure of damages, and if so may be recovered, not as prospective damages, but as compensation for the injury sustained. In this connection, see *The Town of Troy v. Cheshire R. R. Co.* 3 Foster, 83.

Those damages which necessarily result from the injury complained of may be shown under the *ad damnum*, but where the damages, though the natural consequences of the act complained of are not the necessary result of it, they are termed special damages, which the law does not imply, and they must therefore be specified in the declaration or the plaintiff will not be permitted to give evidence of them at the trial. This principle would probably apply to some of the elements of damages above indicated, such as expense of right of way, which, even if not already procured by appellant, might be donated or released, and it might be necessary as to such damages to specify in the declaration and moreover show either actual payment or legal liability to pay on the part of appellee.

The judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

Edwards v. Sams et al.

JONATHAN EDWARDS

v.

BENJAMIN F. SAMS ET AL.

1. **CORRECTING MISTAKE—POWER OF COURT OF EQUITY.**—A court of equity has unquestioned power to correct mistakes in the record of a court. Where the parties to the record seek a correction, it may be made upon motion and proper notice in the court where the mistake occurred; but this rule does not apply to one who was not a party to the record, and was not chargeable with notice of the mistake.

2. **DILIGENCE—INTERVENING RIGHTS.**—Appellant cannot be charged with want of diligence, he bringing his bill within ten days after discovery of the mistake, nor is he obliged to aver that no intervening rights of third parties had accrued. The law will not presume that such rights have accrued, and it is not necessary that such fact should be negatived in the bill.

APPEAL from the Circuit Court of Jackson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. ANDREW D. DUFF and Messrs. BARR & LEMMA, for appellant; that if a subsequent judgment be first docketed a purchaser under it will take a title free from the prior undocketed judgment, cited Freeman on Judgments, § 343.

The public can act upon no other means of information than the official records of the court as kept by the proper officer: McCormick v. Wheeler, 36 Ill. 114; Sattler v. The People, 59 Ill. 68.

Errors of fact in a record may be corrected in the court when made at a term subsequent to the judgment: Mains v. Cosner, 67 Ill. 536; Rev. Stat. 1874, 782, § 67; C. & St. L. R. R. Co. v. Holbrook, 72 Ill. 419; Howell et al. v. Morlan, 78 Ill. 162; Cook v. Wood, 24 Ill. 295.

Where no rights of third parties have intervened, there is no limitation as to time when judgments may be corrected between parties to the record: Church et al. v. English, 81 Ill. 442.

The judgment may be corrected by the minutes kept by the judge: C. & St. L. R. R. Co. v. Holbrook, 72 Ill. 419; Howell et al. v. Morlan, 78 Ill. 162.

The court will amend a clerical mistake, when it is apparent from the files in a cause: *Lyon et al. v. Boilvin*, 2 Gilm. 629; *Coughran v. Gutchens*, 18 Ill. 390.

Endorsements of the clerk upon the files are evidence for this purpose: *Atkins v. Hinman*, 2 Gilm. 437.

A court of equity, in cases of accident or mistake, can amend a record: *Coughran v. Gutchens*, 18 Ill. 390; *Owens v. Ransstead*, 22 Ill. 161; *Robins v. Swain*, 68 Ill. 197.

Mr. WILLIAM J. ALLEN, for appellee; against the right to amend, cited *C. & St. L. R. R. Co. v. Holbrook*, 72 Ill. 419.

Until the amendment is made, the date of the judgment must be held conclusive: *Hogden et al. v. Guttery*, 58 Ill. 431; *Lilly et al. v. Shaw et al.* 59 Ill. 72.

ALLEN, J. This was a bill filed by appellant against appellees, to the September term of the Jackson Circuit Court for 1877. Complainant alleges that he is a resident of New London, in the State of Connecticut. That James V. Logan, of said county of Jackson, was the owner in fee of certain lands in that county described in bill. That said Logan, to secure the payment of a \$5,000 loan made by the Equitable Trust Company, of New York, made a trust deed to complainant, and that by the terms of the deed Logan was to have five and a half years to redeem the lands, by paying principal and interest, according to terms of trust deed.

That deed bears date November 2, 1874, but was acknowledged and filed for record March 25, 1875, in the recorder's office of said county; that when deed was filed for record, the records of Jackson county disclosed no judgment against Logan which was a lien on said lands, and charges that in fact there was no such judgment.

Bill charges that appellant, for the first time, was informed within ten days before bringing their bill that there appears now upon the record of said court a judgment against Logan, and in favor of F. Smith & Co., for \$1,443.96, purporting to have been rendered on the 24th day of March, 1875, one day prior to the filing of appellant's deed of trust for record in the

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recorder's office. Bill charges that no such judgment was rendered on that day. That record of court shows that court was in session on the 25th day of March; that 25th day of March was first Thursday of said term. That suit was pending in that court by F. Smith & Co. v. Logan. That a motion for default by plaintiff against defendant in that suit was made on Thursday, 25th, but that no judgment was rendered. That plaintiff in that suit asked and obtained leave to amend jurat on affidavit of merits. That affidavit had to be sent to St. Louis for amendment to jurat, and that in fact no judgment was rendered until 9th day of April following in that suit.

That plaintiffs in that judgment, F. Smith & Co., had execution issued on the pretended judgment of March 24, and levied upon lands described in deed, and that at a sale on said execution, F. Smith & Co. became the purchasers, at amount of judgment, interest and costs. That they hold a certificate of purchase, and that they will be, unless restrained, entitled to take, and will take, a deed for the premises on that certificate at the end of fifteen months from date of sale. That lands will not be redeemed. That clerk's computation of interest on note shows that it was made on the 9th day of April. That the date of said judgment, as it appears of record, was entered by mistake of clerk, and in fraud of the rights of appellant. That appellant has no remedy at law.

Bill prays that F. Smith & Co. may be restrained from transferring their certificate of purchase to a third party, and that the court may correct the mistake in date of judgment, and decree the trust deed to be declared a prior and superior lien upon the lands described therein, and for general relief.

Upon this bill a temporary injunction was granted by the judge, August 15, 1877. At the September term, 1877, a general demurrer was interposed by appellee to the bill, and demurrer sustained and injunction dissolved. Decree against appellant for costs.

The demurrer to this bill admits everything that is well stated in the bill, and the only question is, did the bill contain enough to entitle the appellant to have the judgment corrected, or to have his deed declared a prior lien upon the land?

The demurrer admits that judgment was not rendered until the 9th of April. Demurrer admits that it was a mistake of the clerk that judgment appears to have been rendered upon the 24th of March; it admits that appellant's deed was filed for record several days before judgment was rendered in favor of F. Smith & Co. against Logan, because these facts are well stated in the bill. But appellee denies the power of a court of equity to correct this mistake, and insists that the mistake could only be corrected on notice and by a motion in the court where the mistake occurred, saving such rights as may have accrued to third parties in the meantime.

That a correction might have been made by the parties to that suit upon motion we do not question. Appellant was no party to that suit, and hence was in no position to avail himself of this method of redress. The decision in *Cairo & St. Louis R. R. Co. v. Holbrook*, 72 Ill. 419, is not applicable to this bill, and the same may be said of *Hodgen v. Guttery*, 53 Ill. 431. These were mistakes where parties to the record sought a correction, and when they were at all times charged with the notice of the mistake. But we apprehend that such a rule would not be applied to one who was no party to the record, who was not chargeable with notice of the mistake, and whose rights were seriously affected by such mistakes.

In *Griffin v. Ketchum*, 18 Ill. 330, the court, in discussing the time within which a motion to amend a record or correct a mistake may be made, say that while a cause is pending such errors may be corrected, and that upon notice to the other party they may still amend after the case is finally determined, except in so far as the amendment may affect the rights of third parties; and after reviewing the cases in which it was held that amendments could be made upon notice, say, "undoubtedly a court of equity, by virtue of its jurisdiction in cases of accident and mistake, upon proper application by bill, and full proof, would grant relief by decree, adjusting and protecting the rights of all persons to be affected thereby." Here is a clear recognition of the doctrine that a court of equity will go beyond a court of law "in correcting mistakes in the record of a court."

In *Owens v. Ransted*, 22 Ill. 161, it is said "that the power of a court of chancery to correct a mistake in a case like this, when properly made out, cannot be questioned." In *Robbins v. Swain*, 68 Ill. 198, where the clerk had improperly entered a decree for sale of a tract of land not included in a foreclosure, the court say, although the mistake "might have been corrected after notice, it is equally within the province of a court to make the correction upon bill filed for that purpose. That this mode of relief is more satisfactory and complete."

In case of *Owens v. Ransted*, *supra*, the learned justice, in delivering the opinion of the court, says: "We think in all cases, if a sheriff or '*other officer*,' by fraud and collusion with a party, or by *mistake*, makes a false return, a court of equity has full power to interfere and give relief, and to permit the party injured to aver against the truth of the return, and show it to be false, *although it is a matter of record*."

We think no decision will be found construing the doctrine laid down in that decision.

The bill avers that a knowledge of the facts as to the mistake of the clerk and of the sale on execution of the land came to him within ten days before this bill was filed. He cannot be charged with want of diligence, then, in not moving sooner in this matter. Appellee says the bill is insufficient because it does not aver that no intervening rights of third parties had accrued. We do not regard this objection as well taken.

The bill asks that F. Smith & Co. may be restrained from transferring the certificate of purchase "which they had," and that no deed shall be taken by them under their purchase. The law will not presume that intervening rights have accrued, and it was not necessary that that fact should be expressly negatived in the bill. Under the statements in the bill we hold that the injunction ought not to have been dissolved, and for the reasons above we reverse the decree of the Circuit Court, and remand the cause for further proceedings in that court.

Reversed and remanded.

Reynolds v. Dishon et al.

ROBERT S. REYNOLDS, Adm'r

v.

CALVIN B. DISHON ET AL.

1. REVIVING JUDGMENT—RIENS PER DESCENT.—The statute authorizes the plea of *riens per descent* where a recovery is sought against the heir, for the indebtedness of the ancestor; but if the lands described in the *scire facias* to revive the judgment, had not descended to the heirs, no judgment could be rendered against them, and such plea would be improper.

2. FORECLOSURE OF MORTGAGE—PRESUMPTION OF SATISFACTION.—If the proceedings to foreclose a mortgage upon the land and subject it to sale were fatally defective, such mortgage could not, after the lapse of nearly twenty years, be interposed as an obstacle to the revival of the judgment, and subjection of the land to sale thereunder. And if such proceedings were valid, but no conveyance to the purchaser was ever executed, it will be presumed after the lapse of nearly twenty years, that the land had been redeemed from such sale.

APPEAL from the Circuit Court of Union county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. W. S. DAY, for appellant; that the law presumes redemption from the mortgage sale after the lapse of time here shown, cited Rucker v. Dooley, 49 Ill. 377; Schrader v. Peach, 77 Ill. 615.

A sheriff can only convey land by deed containing apt words of grant: Johnson v. Bantock, 38 Ill. 111; Johnson v. Baker, 36 Ill. 99; Miami Co. v. Heirs of Halley, 7 Ohio, 11.

Scire facias lies against the heir only to the extent of his inheritance: 8 Bac. Abr. 611.

The judgment should find the value of the lands, and if worth more than the widow's homestead, order that they be sold to satisfy the judgment: 6 Iowa, 39; 4 Halstead (N. J.), 32.

Mr. A. N. DOUGHERTY, for appellees; that the assignment of errors is of facts, and not of a judgment or decree of court, and therefore not cognizable in this court, cited Rev. Stat. 1877, 76, § 8; Beaubien v. Hamilton, 3 Scam. 213.

The judgment was in favor of the plaintiff, and he cannot

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bring it into this court by appeal: *Addix v. Fahnestock et al.* 15 Ill. 448.

Upon the plea interposed, the court could render no different judgment: Statute of Frauds and Perjuries, § 18; *Ryan v. Jones*, 15 Ill. 1.

TANNER, P. J. The appellant sued out a *scire facias*, directed to Josephine T. Dishon as the widow, and to the appellees as the heirs of Henry Dishon, deceased, for the purpose of reviving a judgment in the Circuit Court of Union county. The widow set up a right of homestead in the premises, and the heirs plead *riens per descent, nul tiel record* and the Statute of Limitations.

The evidence shows this state of facts: John Moreland, in October, 1858, recovered a judgment in said court for \$500, with cost, against Henry Dishon and Calvin B. Dishon. In 1859 Henry Dishon died without having paid said judgment. Subsequently Moreland died, and the appellant was duly appointed administrator of his estate. On the 30th day of November, 1853, Henry Dishon was the owner in fee of lots numbered 33 and 34, in "Grammar's Donation to Jonesboro," and on the said day he executed and delivered a deed of mortgage for said lots to Lorenzo P. Wilcox, to secure the payment of \$1,500 in three installments, the last to fall due in three years from that date. His wife joined in the mortgage and relinquished her dower in the lots. On the second day that Moreland obtained his judgment, Wilcox foreclosed or attempted to foreclose his mortgage by *scire facias*, and an execution was awarded against the lots for the sum of \$1,500. The judgment of foreclosure does not describe the lots, but simply directs an execution against the "mortgaged premises."

In December following the rendition of the judgment of foreclosure, a special execution was issued and delivered to the sheriff, as appears by his indorsement on the 7th of December. On the 15th of January following the execution was returned, indorsed, "Sold on the 1st day of January, 1859, to Lorenzo P. Wilcox, for the sum of \$1,537. I hereby return this *fi. fa.* satisfied on this 15th day of January, 1859."

The premises were occupied by Henry Dishon at his death as a homestead, and his widow has occupied them as such ever since, and at the institution of this proceeding they were worth \$2,500. Letters of administration were never sued out upon the estate of the said decedent. That in 1859 or 1860 the amount of money necessary to redeem the premises from the sale was tendered to the then sheriff of Union county, but he did not accept it.

The court upon the foregoing facts found the right of homestead to exist in behalf of Josephine T. Dishon, widow of Henry Dishon, deceased, and for the appellees on the plea of *riens per descent*, and against them upon the pleas of *nul tiel record*, and the Statute of Limitations, and rendered judgment in the following words: "It is therefore adjudged and ordered by the court that the said judgment be revived against the said defendants, to be satisfied out of any property hereafter descended to them from the said ancestor."

The appellant took exceptions to the rendition of the foregoing judgment, and assigns for error,

1. The court erred in finding for the appellees on the first plea.

2. The court erred in not finding for the plaintiff on the first plea and in not finding the value of the premises and ordering that they be sold to satisfy said judgment.

The plea of *riens per descent*, we think, presented no issue in this proceeding. The Rev. Stat. 1874, Ch. 542, § 13, authorizes this plea where a recovery is sought against the heir for the indebtedness of the ancestor, and this is the use assigned to the plea in the works on pleading. If the lands described in the *scire facias* had not passed by descent to the appellees, it was a matter of no moment to them that such lands should be subjected to sale in satisfaction of the judgment against their ancestor. In such case no judgment could be rendered against them.

If the defects attending the proceeding to foreclose the Wilcox mortgage and subject the lots to sale were fatal, it seems clear that the mortgage could not at that late day be interposed as an obstacle to the revival of the judgment and the subjection

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of the mortgaged premises to sale in behalf of the appellant. It also seems equally clear that if the foreclosure of the mortgage and the sale of the lots were regular and valid, but that no deed of conveyance was ever executed to the purchaser thereof after the lapse of nearly twenty years, it would be but reasonable to presume that the premises had been redeemed from such sale. This view falls within the reasoning of the court in *Rucker v. Dooley*, 49 Ill. 377. A revival of the judgment can only operate upon the premises described in the *scire facias*, and if the title is not in the appellees they can in no wise be affected thereby, neither could it be prejudicial to the rights of the widow of Henry Dishon. The statute affords to her a complete shield.

We are of the opinion that the appellees were the owners of the lots described in the writ in fee simple, and that the judgment obtained by John Moreland against Henry Dishon and Calvin B. Dishon should have been revived and an execution ordered for the sale of the premises described in the *scire facias*.

The judgment of the Circuit Court must therefore be reversed and the cause remanded.

Reversed and remanded.

THE CITY OF ANNA

V.

CORNELIUS O'CALLAHAN.

1. MUNICIPAL OFFICER—INTERESTED IN CONTRACT.—If a municipal officer contracted to furnish an article to the corporation or city, and had an interest in its sale, he would come within the prohibition of the statute forbidding such contracts by a city officer; but if he only ordered the article by authority of the city and advanced the money to pay for it, he would not.

2. AUTHORITY TO PURCHASE.—One member of a committee of the city council cannot, without the concurrence of the other members of the committee, or a majority of them, authorize the purchase of an article for the use of the city.

APPEAL from the Circuit Court of Union county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

City of Anna v. O'Callahan.

Mr. ALEXANDER J. NISBIT and Mr. W. C. MORELAND, for appellant; that appellee, being an officer of the city at the time, could not become interested in a purchase for the use of the city, cited Rev. Stat. 1874, 225, § 78; *Smith v. Eureka Flour Mills Co.* 6 Col. 1; *Maddox v. Graham*, 2 Met. 56; *Abbott's Dig. Law of Cor.* 668.

Corporations and their officers can only act within the scope of the powers conferred by the charter, and such powers are to be strictly construed: 1 *Dillon on Mun. Cor.* 173; *Minturn v. Larue*, 23 How. 435; *Thompson v. Lee Co.* 3 Wall. 320; *Thompson v. Richardson*, 12 Wall. 349; *Clark v. Davenport*, 14 Iowa, 495; *Messiam v. Moody's Ex.* 25 Iowa, 163; *Nichol v. Mayor, etc.*, 9 Humph. 252; *Leonard v. Canton*, 35 Miss. 189; *Douglass v. Placeville*, 18 Col. 643; *Argentine v. San Francisco*, 16 Cal. 282; *Wallace v. San Jose*, 29 Cal. 180; *Lafayette v. Cox*, 5 Ind. 38; *Bank v. Chillicothe*, 7 Ohio, 31; *Collins v. Hatch*, 18 Ohio, 523; *Smith v. Madison*, 7 Ind. 86; *Kyle v. Molin*, 8 Ind. 34; *Willard v. Killingworth*, 8 Conn. 247; *Brady v. Mayor, etc.*, 20 N. Y. 312; *Hodges v. Buffalo*, 2 Denio, 110; *Halsted v. Mayor, etc.*, 3 Comst. 480; *Boom v. Utica*, 2 Barb. 104.

The journal showing proceedings of the common council was competent evidence: Rev. Stat. 1874, 224.

Appellant is not required to file a bond on appeal: Rev. Stat. 1874, 242.

An unauthorized contract, however advantageous, does not bind a corporation: *Jeffersonville v. Ferry Boat*, 35 Ind. 19; *Seibrecht v. New Orleans*, 12 La. An. 496; *Wood v. Waterville*, 5 Mass. 294; *Jones v. Lancaster*, 4 Pick. 149.

Assent of the corporation must be shown: 1 *Dillon on Mun. Cor.* 479.

The common council cannot authorize an expenditure exceeding the annual tax levy: Rev. Stat. 1874, 227; *Weston v. Syracuse*, 17 N. Y. 110; 1 *Dillon on Mun. Cor.* 204.

Persons contracting with a municipal corporation, must inquire into the power to make the contract: 1 *Dillon on Mun. Cor.* 463; *Root v. Wallace*, 4 McLean, 8.

Where the charter prescribes what contracts and under what

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formalities the officers may contract, there must be a compliance with it: *Butler v. Charleston*, 7 Gray, 12; *Appleby v. Mayor*, etc. 15 How. Pr. 428; *Baltimore v. Erchbach*, 18 Md. 276; *White v. New Orleans*, 15 La. An. 667; *Abbott's Dig. on Corporations*, 442.

Individual members of the city council cannot bind the city by their contracts: *Lottman v. San Francisco*, 20 Cal. 96; *Leavenworth v. Rankin*, 2 Kan. 357; *Abbott's Dig. on Corporations*, 520; *Cowen v. West Troy*, 43 Barb. 48; *Johnson v. Common Council*, 16 Ind. 227; *Brady v. Mayor*, etc. 20 N. Y. 312.

Mr. MATTHEW J. INSCORE, for appellee; insisted that the statute prohibiting a city officer to become interested in contracts for the city, has no application in this case, and cited *Rev. Stat. 1874*, 240, § 169.

All exceptions must be taken at the time of trial: *Rev. Stat. 1874*, 782, § 60; *Clemson v. Kruper*, *Beecher's Breese*, 210; *Buckmaster v. Beames*, 4 Gilm. 443; *Dickhut v. Durrell*, 11 Ill. 72; *Lincoln v. Clafin*, 7 Wall. 132; *Grimes v. Butts*, 65 Ill. 347; *St. L. A. & T. H. R. R. Co. v. Dorsey*, 68 Ill. 326; *Brown v. Clement*, 68 Ill. 192; *Seibel v. Vaughn*, 69 Ill. 257.

The bill of exceptions does not purport to contain all the evidence: *Ottawa Gas Co. v. Graham*, 35 Ill. 346; *Buckland v. Goddard*, 36 Ill. 206; *Ballance v. Leonard*, 37 Ill. 43; *Estey v. Grant*, 55 Ill. 341; *Goodrich v. City of Minonk*, 62 Ill. 121; *Wilson v. McDowell*, 65 Ill. 522; *Culliner v. Nash*, 76 Ill. 515; *Henry v. Holloway*, 78 Ill. 356.

ALLEN, J. Appellee brought suit for \$31.20 against appellant before a justice of the peace, and recovered a judgment for that sum and costs. An appeal was taken by appellant to the Circuit Court of Union county, and the cause was tried by a jury in that court, which resulted in a verdict for appellee for that sum. A motion was entered by appellant for new trial. That motion was overruled by the Circuit Court and judgment rendered on verdict for \$31.20, which appellee claims to have paid for a pump ordered by the city authorities through him

for one of the public wells of the city, and its payment is resisted by appellant on two grounds: 1. That appellee had no authority to order the pump. 2. That as an officer of the city he could not make a contract for its purchase. The evidence shows that appellee was at the time the pump was procured, the city clerk.

That at that time the city council had a committee of three of its members, whose duty it was to look after the city wells. That Bohannon, Henderson and Trent were members of that committee.

The evidence of the appellee is that Bohannon told him to order the pump; that he, Bohannon, said he had the concurrence of Henderson, another member of the committee, in making the order. That in pursuance of the order he wrote to St. Louis and procured the pump, and paid the charges on same, amounting to \$31.20. That he had no authority to do so from any one but Bohannon; but that after the pump was put in the well Henderson said to appellee that it was a valuable improvement.

Bohannon testifies that he had a conversation with appellee about the well, and that he (Bohannon) recommended the pump, but that he had had at that time no conversation with Henderson about the pump.

Henderson testifies that he never had any conversation with Bohannon about the pump; that he knew nothing about it until after it was purchased and put in the well.

Trent, the chairman of the committee, testifies that he knew nothing about the pump till the appellee's bill was presented for payment, and that he was opposed to putting a pump in the well.

Sec. 78, Rev. Stat. 1874, 225, provides that no officer of a city shall be "interested in any contract work or business of the city," etc., and appellant insists that appellee in this transaction comes within the provision of this section, and he is not entitled to recover. If appellee contracted to furnish a pump, and had an interest in its sale to the city, then he would be within its purview. If he only ordered a pump by authority of the city and advanced the money to pay for it, then he would not. The

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construction of the section given by appellant would prevent the city from procuring any material which it might need, for this could only be done through some one or more of its officers. This very narrow construction would prohibit the clerk or any one else belonging to the city government from purchasing even the necessary stationery for the business of the city council. We think that this objection of appellant is not well taken.

There are some other points made by appellant, but they are, in the opinion of the court, not of sufficient importance to require comment.

The only remaining question to be considered is, did the evidence in this case support the verdict of the jury? This court would not be inclined to reverse a cause when the evidence was conflicting, or even when the court might think the weight of evidence was against the finding.

In this case the appellee says the only "authority he had to order the pump was from Bohannon." Bohannon could not make the order without a concurrence of other members of the committee, or at least a majority of them. The other members of the committee on improvement repudiate the order, deny that Bohannon was authorized by them to give any such order, and deny that since the pump was procured they have in any way ratified the order for its purchase.

We think the evidence fails to show any authority to order the pump that could bind the city to pay for it, and that the court erred in overruling the motion for a new trial, and for this reason this cause is reversed and remanded.

Reversed and remanded.

The People v. Neal et al.

THE PEOPLE OF THE STATE OF ILLINOIS

8	181
112	614

v.

JOHN W. NEAL ET AL.

APPEAL—FINAL ORDER.—This court has jurisdiction only in matters of appeal and writs of error from the *final* judgments, orders and decrees of the Circuit and other courts.

APPEAL from the County Court of Hamilton county; the Hon. CLOYD CROUCH, Judge, presiding.

Mr. JOHN C. EDWARDS, for appellants.

Messrs. WALKER & HALE, for appellees; that a motion to discharge bail is addressed to the discretion of the court, and its decision thereon cannot be assigned for error, cited Bruner v. Ingraham, 1 Scam. 556; Adams v. Bartlet, 5 Gilm. 170; Walker v. Welch, 14 Ill. 277; Bancroft v. Eastman, 2 Gilm. 259; Morrison v. Silverburgh, 13 Ill. 552.

BAKER, J. This was a *scire facias* on a forfeited recognizance at the December term, 1877, of the County Court. On motion of appellee, based on affidavit, the default on the recognizance was set aside. The State's attorney excepted to the ruling of the court, and prayed an appeal to this court, which was allowed.

The appeal was inadvertently allowed and improperly taken. This court has jurisdiction only in matters of appeal and writs of error from the *final* judgments, orders and decrees of Circuit, County and other courts. Laws of 1877, page 70, § 8, and page 77, § 123.

No final order or judgment was rendered by the County Court; the case is still *in fieri* in that court, and until it is finally disposed of no appeal lies. Gage v. Eich, 56 Ill. 297; Phelps v. Fickes, 63 Ill. 201.

The appeal must be dismissed.

Appeal dismissed.

Collins v. Montemy.

JAMES COLLINS

v.

FILMAN A. MONTEMY, Adm'r.

3	189
57	140
3	189
86	555
3	182
186	125
186	127

1. **PROMISSORY NOTE—DAYS OF GRACE.**—Promissory notes, other than such as are payable at sight, or on demand or presentment, are entitled to days of grace, and suit cannot be brought thereon until after the expiration of the days of grace.

2. **PREMATURE ACTION—OBJECTION ON TRIAL.**—A cause of action must exist at the time suit is instituted, and where a demand has not matured at the time of bringing suit, the objection may be made on trial. The suing out of the summons is the commencement of the suit.

APPEAL from the Circuit Court of Jefferson county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Messrs. POLLOCK & SON and GREEN & CARPENTER, for appellant; that the law presumes that all pleadings before a justice are oral, cited *Wilson v. Bevans*, 58 Ill. 232; *Town of Lewiston v. Proctor*, 27 Ill. 414; *Williams v. Corbett*, 28 Ill. 262; *Frye v. Tucker et al.* 24 Ill. 181.

On appeal from a justice the case is tried *de novo*: *City of Alton v. Kirsch et al.* 68 Ill. 261; *Minard v. Lawlor*, 26 Ill. 302.

Where a suit is prematurely brought, advantage may be taken of it on the trial: 1 *Chitty's Pl.* 453; *Archibald v. Argall*, 53 Ill. 307; *Harlow v. Boswell*, 15 Ill. 56; *Nickerson v. Babcock*, 29 Ill. 497.

If the justice had jurisdiction, the Circuit Court can only inquire into the merits between the parties: *Vaughn v. Thompson*, 15 Ill. 39; *Swingley v. Haynes*, 22 Ill. 214; *Thompson v. Sutton*, 51 Ill. 213; *Allen v. Nichols*, 68 Ill. 250; *Zuel v. Bowen*, 78 Ill. 234.

The summons issued by the justice was the commencement of the suit, and no demand maturing after that time could be given in evidence: *Rev. Stat.* 1874, 640, § 17; *Feazle v. Simpson et al.* 1 *Scam.* 30; *Daniels v. Osborn et al.* 71 Ill. 169.

Plaintiff must show an indebtedness existing at the time of bringing suit: *Hamlin et al. v. Race*, 78 Ill. 422; *McCoy v. Babcock*, 1 *Bradwell*, 414.

MR. T. S. CASEY and Mr. C. H. PATTON, for appellee; that an action is premature is matter in abatement only, cited Archibald v. Argall, 53 Ill. 307; Palmer v. Gardiner et al. 77 Ill. 143; Chitty's Pl. 453.

By pleading to the merits, appellant waived his dilatory plea in abatement: Thomas v. Lowy, 60 Ill. 512; Pearce et al. v. Swan, 1 Scam. 266; Gilmore et al. v. Nowland, 26 Ill. 200; Mills v. Ex'rs of Bland, 76 Ill. 381; Lindsay v. Stout, 59 Ill. 491; Conly v. Good, Beecher's Breese, 135; Adams v. Miller, 12 Ill. 27; Wilson v. Nettleton, 12 Ill. 61.

BAKER, J. This was a suit brought by appellee against appellant before a justice of the peace, and a judgment was rendered by the justice against the appellant, and appeal was taken to the Circuit Court of Jefferson county, where the case was submitted to a jury, with a like result. A motion for a new trial was overruled by the court, and appellant excepted and brings the record to this court. The points referred to by us in this opinion are fully covered by the rulings of the court below, the exceptions there taken, and the errors here assigned.

The summons was issued by the justice of the peace on the 11th day of November, 1875; was made returnable on the 16th day of that month, and was served on appellant by the constable on the 12th day of said month of November.

The suit was predicated upon a promissory note, dated February 12, 1875, and due nine months after date. This would make it mature on the 15th day of November, 1875. In all computations of time, a month shall be considered to mean a calendar month, and a day shall be considered a thirtieth part of a month. Rev. Stat. Ch. 98, § 16; Ch. 74, § 10; Ch. 131, § 1, tenth clause. Promissory notes other than such as are payable at sight, or on demand, or on presentment, are entitled to days of grace. Rev. Stat. Ch. 98, § 15.

But it is urged by appellee that it should be made to appear that the objection was raised before the justice and by plea in abatement; such is not our understanding of the law. The suing out of the summons was the commencement of the suit. Rev. Stat. ch. 79, § 17; Feazle v. Simpson, 1 Scam. 30.

The cause of action must exist at the time of the institution of the suit, and where the demand has not matured at the time of the institution of the suit, and the general issue is pleaded, the defendant may avail himself of the objection on the trial. *Harlow v. Boswell*, 15 Ill. 56; *Nickerson v. Babcock*, 29 Ill. 497; *Daniels v. Osborn*, 71 Ill. 169; *Hamlin, Hale & Co. v. Race*, 78 Ill. 422; and authorities there cited. In this latter case the Supreme Court say: "We had supposed no rule was more inflexible or better established than that a plaintiff cannot recover for money not due at the institution of the suit."

It is a good plea in abatement to the action of the writ that it was prematurely brought, but as this is ground of demurrer or non-suit, it is very unusual to plead it in abatement. 1 Chit. Pl. 422, 453.

We are referred, however, by appellee, to the cases of *Archibald v. Argall*, 53 Ill. 307, and *Palmer v. Gardner*, 77 Ill. 143. We do not regard either of these cases as militating at all seriously against the conclusions we have reached in this case.

In *Archibald v. Argall supra*, the defense was not that the money was not due for the goods sold under and by the terms of the contract of purchase, but that by a subsequent agreement *dehors* the contract of sale, the plaintiff agreed to extend the time for the payment of the account. The court held that the matter stated in the special plea filed in that case, was in abatement and not in bar of the action. The distinction between that case and the case at bar is obvious; and again in the plea filed in that case, there was no consideration stated to sustain the promise to extend the time of payment, and the plea was bad on that account.

Palmer v. Gardner supra, was a bill in chancery to enjoin the collection of two judgments theretofore recovered at law. One ground alleged in the bill was that the note upon which these judgments were predicated was only due one day by its terms when suit was brought, and days of grace were not allowed. In that case, the Supreme Court say: "As to the question of the days of grace, the bill is loose and defective. It merely states conclusions. It should have given the date on which the note was in terms payable, together with the date of

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the commencement of the suit, that it might be determined whether the suit was prematurely brought. The bill only states that it was." Now this fully disposed of this chancery case, so far as this question was concerned, and that which is subsequently said *in arguendo*, and without any reference to authority, in regard to the necessity of pleading in abatement, was wholly unnecessary for the decision of the case.

We are of the opinion that the court below erred in overruling appellant's objections to the introduction of the note in evidence, and in permitting it to be read to the jury; and also in overruling the appellant's motion for a new trial.

The judgment is reversed and the cause remanded.

Reversed and remanded.

TANNER, P. J., took no part in the decision of this case.

JEREMIAH BENNETT

v.

JOHN T. PULLIAM.

1. PLEA OF SET-OFF—WHAT MAY BE SHOWN UNDER.—A plea of set-off is in the nature of a cross-action and under a general replication to such plea evidence may be given, that the subject matter of the set-off is a partnership asset between plaintiff and defendant.

2. FORMER ADJUDICATION.—When plaintiff, under his general replication to defendant's plea of set-off, alleged that the wood, the value of which was sought to be set-off against his demand, was partnership wood, it was competent for the defendant to show that in a former suit between them, the question of partnership in the wood had been decided adversely to the plaintiff, and this could be done under the pleadings as they then stood; defendant was not obliged to plead former adjudication to plaintiff's replication.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. EDWARD L. THOMAS, for appellant; against the instruc-

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tion given for appellee, cited Ill. Cent. R. R. Co. v. McKee, 43 Ill. 119; Adams v. Smith, 58 Ill. 117.

Appellee having sworn to a fact as existing, he is estopped to claim anything contrary to such sworn statement: Bigelow on Estoppel, 23; Smith v. Newton, 38 Ill. 230; Flower v. Elwood, 66 Ill. 438; The People v. Brown, 67 Ill. 435; Flanigan v. Turner, 1 Blackf. 491.

Messrs. WILDERMAN & HAMILL, for appellee; that under the pleadings, evidence of partnership in the wood was admissible, cited 2 Greenleaf's Ev. § 135; Wann et al. v. McNulty, 2 Gilm. 355; Whitesides v. Lee et al. 1 Scam. 548.

Erroneous instructions will not be ground for reversal if the evidence sustains the verdict: Hall v. Groufe, 52 Ill. 421; Watson v. Woolverton, 41 Ill. 242; Gilchrist v. Gilchrist, 76 Ill. 281.

The doctrine of estoppel is based upon a fraudulent purpose and a fraudulent result: Davidson v. Young, 38 Ill. 152; 2 Story's Eq. Jur. § 1543; Mills v. Graves, 38 Ill. 465; People v. Brown, 67 Ill. 435.

ALLEN, J. This was an action of assumpsit brought by appellee against appellant and James Fincher in the St. Clair Circuit Court, to the April term, 1877, on a promissory note for \$300, dated Nov. 5, 1875, payable to appellee and signed by appellant and Fincher.

Fincher filed his several pleas, "non assumpsit" and "release," and afterward suit was dismissed as to him.

Appellant severally filed his plea "general issue" and "set-off;" afterward the plea of general issue was withdrawn, leaving only the plea of set-off. To this plea appellee filed a general replication, and upon this plea and replication the cause was tried by a jury at the September term, 1877.

The jury found for appellee, and assessed his damages at \$387.30.

Appellant moved for a new trial, which motion was overruled by the court, and judgment was rendered on verdict of jury for \$387.30 and costs. An appeal was prayed by appellant and was allowed to this court.

Upon the trial appellee introduced the note in evidence and rested.

Appellant then introduced in support of his plea of set-off, evidence to prove that appellee had received between 400 and 500 cords of wood from appellant, worth \$1.50 per cord.

Appellee introduced evidence tending to prove that the cord-wood received from appellant was partnership wood which he and appellant owned jointly. To this evidence of appellee appellant objected, but the court overruled the objection.

Appellant then offered to introduce evidence tending to show that in a former suit between appellee and appellant, the question of partnership had been submitted in that trial, and that the jury found that no partnership had existed. To this evidence appellee objected, and the court sustained the objection. After the evidence was closed, the court, on behalf of appellee, gave the jury the following instructions:

1. If plaintiff and defendant were partners in wood, etc., the jury should not allow set-off.

2. The court instructs the jury that in the former trial in this court between Pulliam and Bennett, the jury which tried said cause between Pulliam and Bennett had nothing whatever to do with the question of whether Bennett and Pulliam were partners in business in matters that were not submitted to said jury, and the jury in this case are instructed that they have nothing whatever to do with the finding or decision of the former jury in the case of Pulliam v. Bennett.

3. If Fincher was not released by agreement, then the jury must find for plaintiff.

4. If plaintiff and defendant were partners, then they must find for plaintiff.

Defendant objected to giving above instructions severally. Objection overruled and defendant excepted.

The first error assigned is that improper evidence was permitted to go to the jury by the court on behalf of appellee.

It is insisted that appellee, under his general rejoinder to appellant's plea of set-off, could not introduce evidence tending to prove partnership in the wood. We think this objection is not well taken

Bennett v. Pulliam.

If this were a suit by appellee for the value of the wood, the defendant could, under "*non assumpsit*," introduce evidence of partnership. A plea of set-off is in the nature of a cross action, and a general replication to such plea performs the same office that a plea of general issue would in an action of *assumpsit*.

"The defendant may plead '*non assumpsit*' when there is a partnership between defendant and plaintiff." Saunders on Pleading and Evidence, Vol. 2, 648.

The second error assigned is the refusal of the court to permit appellant to introduce evidence to show that this question of partnership in the wood had been adjudicated in a former trial between appellee and appellant, and that in that suit the jury found that no partnership existed.

To determine the correctness or incorrectness of the ruling on this point, we must again revert to the pleading. Appellant in his plea claims compensation for wood. Appellee replies generally: you have no right to such compensation in this suit. Appellant makes his proof that appellee got the wood. Appellee replies: the wood I got was partnership wood. Appellant proposes to show that in a former suit this question of partnership was litigated, and it was found no partnership existed; shall he not be permitted to do so? Appellee says he must plead former adjudication. Plead it how; rejoin it to appellee's general replication? This he could not do, for he could not know that appellee would attempt to set up partnership. If appellee had replied specially, as he could do, that the wood was partnership wood, then appellant could have rejoined the former adjudication, and he must have done so before his proof would have been admissible; but to hold that appellant could not rebut proof of partnership offered by appellee under the issues as they were in this suit, and as appellee himself had made them, was in our judgment error in the Circuit Court.

Exception was taken to the second instruction given for appellee by the court, and the giving of that instruction is assigned for error.

That instruction assumes that in a former trial between these parties, the question of partnership in this wood was not

inquired of by the jury, or if the jury did make such inquiry they had no right to do so. Now whether the jury did or did not inquire into and pass upon that question, was a question of fact upon which the court could not instruct, and whether they had a right to inquire into that question would depend upon the pleadings in that suit. Under the pleadings in that case, whether they could consider the question of partnership would be a question of law, but what the pleadings were was a question of fact upon which the court could not pass in an instruction. We regard the instruction as erroneous in that regard, and when we consider the latter part of that instruction in connection with some of the testimony in this trial, it may have misled the jury.

It appears from the testimony of appellant on this trial that, in a former trial between him and appellee, this question of partnership in this wood was in some way involved in the trial of that cause. When asked by counsel for appellee if he had not testified on former trial that wood was partnership property, he answered that he did, but he (appellee) outswore me. My understanding was that he (appellee) went down there (meaning to the Pierce land, where the wood was) as my partner, but he (appellee) denied it, and swore it all the same. He (appellee) swore he went down there to work for me. What appellee swore in that regard was also introduced; he says I had no settlement with Bennett (appellee) before I went on the Pierce land. "Bennett never settled with me by giving me mill and partnership timber on Pierce land." There never was any understanding about it (the partnership), for I never accepted his proposition.

In answer to question whether he had not taken mill and interest in timber for his debt against Bennett (appellant) his answer was, *no sir*, I never did.

From these extracts of appellee's testimony on former trial, and appellant's testimony on the present trial, then it is manifest a partnership in this timber on the premises described was set up by appellant against the claim of appellee in that suit, and that appellee was repelling the idea of a partnership between them, and while the real merits in that suit was not presented in

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this, yet the jury, after hearing the testimony called out by appellee in his cross-examination of appellant, the jury are instructed that they have nothing to do with the finding or decision of the jury in the former case.

Such an instruction might be understood by them to mean that as they had nothing to do with the finding of the jury in the former trial, they must disregard the evidence on this trial of what was sworn to on the former trial.

We regard this instruction as erroneous, and for these reasons reverse the decision of the Circuit Court.

Reversed and remanded.

BAKER, J. In the conclusion reached that this judgment should be reversed and the cause remanded, I altogether concur. I think that the evidence in this record clearly shows there was no partnership between Bennett and Pulliam. Therefore, appellant's set-off for the wood should have been allowed by the jury. To form a partnership, at least so far as the parties themselves are concerned, the assent of both of the contracting parties is required. While the evidence shows assent on the part of Bennett, it also shows clearly there was no assent whatever on the part of Pulliam. Either both parties must be bound, or neither. The court erred in overruling the motion for a new trial.

I do not understand, however, that the offer of appellant in the Circuit Court went to the extent of proving there had been an issue and former adjudication between the parties on the question of partnership. The question of a partnership seems to have been incidentally raised in some manner, in some former litigation. I cannot concur in all that is said in the opinion filed upon this subject.

TANNER, P. J. I concur in the reversal of the judgment, but place it upon the ground stated in the opinion of Judge Baker.

Buchanan v. Bartow Iron Co.

WILLIAM C. BUCHANAN
v.
BARTOW IRON COMPANY.

CORPORATION—PERSONAL LIABILITY OF DIRECTOR OR OFFICER.—Under the general incorporation law creating a personal liability against the officers and directors of corporations for indebtedness exceeding the capital stock, such officers and directors are liable only to the creditors as a whole, and not to any individual creditor for the amount of his individual debt, and this liability can be enforced only in chancery. The object of the statute is to furnish a remedy and relief to the creditors generally, and a common fund to which they may, on terms of perfect equality, resort for the satisfaction of their debts.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant.

Mr. JAMES M. DILL, for appellee.

BAKER, J. Appellant was president of the Belleville Nail Mill Company, a corporation organized under the general law of 1857, and judgment was recovered against him in the Circuit Court by appellee, in an action of assumpsit for a debt of \$4,935.37, contracted by the said nail company with the assent of appellant.

The supposed liability of appellant is predicated upon § 16 of the general incorporation law of 1872, Rev. Stat. 288. That section reads as follows: "If the indebtedness of any stock corporation shall exceed the amount of its capital stock, the directors and officers of such corporation, assenting thereto, shall be personally and individually liable for such excess to the creditors of such corporation."

In this case the first count of the declaration avers an indebtedness of \$100,000, and the second and third counts aver an indebtedness of \$150,000 in excess of the capital stock of the company, and the proofs show an indebtedness of over \$100,000 in excess of the capital stock of the company, thus indicating that there are creditors other than appellee.

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We are of the opinion that the liability of the appellant under this section, if he be liable at all, is solely and only in a court of chancery, and is to the creditors as a whole, and is not to any individual creditor for the amount of his individual debt. We think that this is so, from a consideration of the several provisions of the statute itself, from the reason, justice and very nature of the case, and from the authorities.

Upon examination of the several sections of this act that impose liabilities upon parties other than the corporation itself, we find it is provided in the eighth section that each stockholder and assignee of stock shall in a certain contingency be liable for the debts of the corporation, to a certain specified extent; that it is provided in the eighteenth section that any pretended officers or agents of any real or pretended corporation, shall in a certain contingency be jointly and severally liable for certain specified debts and liabilities; that it is provided in the nineteenth section that directors, officers or agents of corporations shall in a certain other specified event be jointly and severally liable for certain other specified debts; and that it is provided in the twenty-first section that certain officers of corporations shall, in a still other specified event, be jointly and severally liable for all damages. These three first mentioned sections fix a liability for the debts themselves, and *ex necessitate rei* a liability to the persons to whom the debts are owing. The last mentioned section imposes a liability for damages suffered, and of course to be recovered by the party damnified. Sec. 16 is otherwise. It provides that in a certain contingency the directors and officers of a corporation shall be liable for an excess of indebtedness over capital stock, personally and individually, to the creditors of the corporation. The liability is not for any debt or debts, as in the cases of the other sections, but is for an excess of indebtedness, and the liability is not to the persons who hold the contracts of indebtedness in excess, and is not, as in the other sections, to certain specified creditors, or to specified persons damnified, but to the creditors as a class. It appears to us that the use of a phraseology in this section, so variant from the language of the other sections, is evidence of a legislative intent as to cases falling under this

sixteenth section, different from the legislative intention in regard to the cases of the other sections.

We do not claim, however, that under the declaration this case falls within the twenty-fifth section of the same act, where provision is expressly made for a suit in equity. But this latter section, in its full scope and import, is fully in accord with our interpretation of § 16, and provides in express terms for the cases of that section the same remedy that it impliedly provided for the case of the sixteenth section.

It is not readily seen why, in the event the company has ceased to do business, or has failed to pay an execution for ten days after demand, the legal title to the excess should be vested in the creditors as a whole, whereas otherwise the cause of action should be in an individual creditor. No legislative intention to make such difference is expressly indicated in reference to the liability imposed by this section.

The reason, justice and equity of the case lead us to the same conclusions. Granted it is eminently proper that, in the event of an excess of indebtedness over capital stock, the directors or officers assenting thereto should be individually and personally liable for such excess. But why should this excess belong to one creditor more than another? The interests of the particular creditor whose indebtedness was last contracted are not more jeopardized than the rights and interests of those prior creditors whose debts were contracted before the limit was reached, and who have no lien or claim against the property representing the capital stock that the last creditor of them all has not. Why in reason should this last creditor have all the security that other creditors have, and at the same time exclusively have this personal liability in addition? His equities are no greater, if so great, as theirs, and the statute has given this right to the excess in express terms, not to him, but to the creditors of the corporation.

If this liability is to be considered simply as a penalty, and not as intended also to furnish an equitable fund for the payment of the debts of the corporation, then the right to recover this penalty either belongs to the creditors as a whole, or to that creditor who first sues therefor. If it can be recovered by one

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creditor alone, then it belongs to one creditor as much as another, and without regard to priority of indebtedness. If a penalty only, then the penalty should be in gross for the total amount of the excess, and that creditor who first sues, be he a creditor within or without the limit, can recover it, and his recovery will be a bar to any subsequent suit by any other creditor for such penalty or excess.

We do not believe that this was the intention of the law. The import and object of this statutory provision goes far above and beyond this; it was intended to furnish a remedy and a relief to the creditors generally, and a common fund to which they might, on terms of perfect equality, resort for the satisfaction of their debts.

This view of the law seems to be supported by the authorities.

The act of Congress of May 5, 1870, authorizes the formation of corporations within the District of Columbia, and provides, among other things, that "if the indebtedness of any company organized under this act, shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company."

It will be noticed that this language is almost identical with the language used in § 16 of our statute.

The Supreme Court of the United States had this provision of the act of Congress before them in the case of *Horner v. Henning*, 93 U. S. 228. The unanimous decision of the court was, that a suit at law could not be maintained under this provision; that this statutory liability constituted a common fund for the benefit of all the creditors; that they were entitled to share in it in proportion to the amounts of their debts, so far as it might be necessary to pay such debts; and that the appropriate and only remedy was in a court of chancery.

Mr. Justice Miller, in delivering the opinion of the court, says: "The remedy for this violation of duty as trustee is in its nature appropriate to a court of chancery. The powers and instrumentalities of that court enable it to ascertain the excess of the indebtedness over the capital stock, the amount of this

which each trustee may have assented to, and the extent to which the funds of the corporation may be resorted to for the payment of the debts; also, the number and names of the creditors, the amount of their several debts, to determine the sum to be recovered of the trustees, and apportioned among the creditors, in a manner which the trial by jury and the rigid rules of common law proceedings render impossible. This course . . . adjusts the rights of all concerned on the equitable principles which lie at the foundation of the statute."

We would refer, also, to the cases of *Sturges v. Bouton*, 8 Ohio State, 215; *Merchants' Bank v. Stevenson*, 5 Allen, 398; and *Pollard v. Bailey*, 20 Wall. 520; and many other cases might be referred to that throw light upon the questions here involved.

We regard the conclusions that we have reached as being in entire harmony with the decisions of our own supreme court, and as not at all in conflict with the cases cited by appellee. We admit the general doctrine that where the statute creates a legal liability, an implied promise arises out of such liability, and that an action of assumpsit may be maintained. If the legal liability here was a liability to appellee individually as a creditor, or was for the amount of his debt, then the rule would apply. But the liability is to the creditors of the corporation as a body; and if so, then the only appropriate and available remedy is by bill in chancery.

In the case of *Culver v. Third National Bank of Chicago*, 64 Ill. 528, the action was based on the liability imposed by Sec. 9 of the act of February 18, 1857, which is as follows: "All the stockholders of every such company shall be severally, individually liable to the creditors of the company to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company prior to the time when the whole amount of its capital stock shall have been paid in, and a certificate thereof made as hereinafter required." This section, in express terms, declares the liability to be for all debts and contracts made by such company prior, etc., and that the Supreme Court should have held that an action of assumpsit could be maintained against the stockholders for one

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of these debts, or on one of these contracts, is exactly in harmony with the distinction we make.

It may be suggested that the words "shall be liable to the creditors" occur alike in § 9 of the act of February 18, 1857, and in § 16 of the act of 1872, now under consideration, and that, therefore, they should be interpreted alike. This does not follow. Expressions found more than once even in the same statute do not necessarily have the same signification. *Potter's Dwaris on Statutes*, 128. Nor does it state all of the case. In the latter act these general words alone are used; but in the former act, in connection therewith, are words of limitation, and the whole of the words therein, taken together are, "shall be liable to the creditors for all debts and contracts." Thus we see that these additional words so qualify and limit that which otherwise might be a liability to creditors generally as to make it a liability for the debts and contracts of the individual creditor. The fact that the legislature omitted from the statute of 1872 the qualifying words used in the act of 1857, is a circumstance tending to manifest the legislative intention. *Bedell v. Janney*, 5 Gilm. 207. In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all its parts harmonize, if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the legislature intended any part of a statute to be without meaning. *Potter's Dwaris*, 144; *Kent's Com.* 462. If the section under consideration is to be construed as meaning just what the section quoted from the act of 1857 means, then the words "for all debts and contracts" in the latter act, are wholly without meaning, and altogether superfluous.

Steele v. Dunne, 65 Ill. 298, is brought upon the same ninth section in the act of 1857, and is to the same effect.

Butler v. Walker, 80 Ill. 345, was predicated upon Sec. 16 of the general act for incorporating and regulating insurance companies, adopted March 11, 1869. That section provides that "the trustees and corporations of any company organized under this act, shall be severally liable for all debts or responsibilities of such company to the amount by him or them subscribed, until the whole amount of the capital of such company

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shall have been paid in, and a certificate thereof recorded as hereinbefore provided." Here the liability is for all debts and responsibilities, just as in the two preceding cases it is for all debts and contracts, and the case is identical in principle with those cases, and still further corroborates our view.

In our opinion, an action at law cannot be maintained on the liability imposed by Sec. 16 of the act of 1872, and the Circuit Court erred in overruling the motion in arrest of judgment.

As there is no provision made by statute for changing an action at law into a bill in chancery, it would be a work of supererogation to remand this cause. The case will not be remanded; but the judgment of the Circuit Court will be reversed, and a judgment will be rendered in this court against the appellee for costs of suit. Moreover, we are informed that many other cases are depending upon the determination of this suit, and this course will facilitate a review of our decision in the Supreme Court, should such review be desired.

Reversed.

TANNER, P. J., dissenting

SAMUEL W. DUNAWAY

v.

JOHN GOODALL ET AL.

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1. PLEADING—AMENDMENTS—PLEA IN ABATEMENT NOT AMENDABLE.—A plea in abatement is a dilatory plea, not going to the merits of the action, and is not amendable. The statute allowing amendments to pleadings does not embrace pleas in abatement unless they go to the merits of the action.

2. STATUTE—GENERAL AND PARTICULAR EXPRESSIONS—CONSTRUCTION—RULE.—Where, in a statute, a general intention is expressed, and the act also expresses a particular intention incompatible with the general intention, the particular intention is to be considered in the nature of the exception.

APPEAL from the Circuit Court of Williamson county; The Hon. MONROE C. CRAWFORD, Judge, presiding.

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Mr. WILLIAM J. ALLEN, for appellant; that leave to file an amended plea in abatement should not have been granted, cited Trinder v. Durant, 5 Wend. 77; 2 Arch. 239; 1 Chitty's Pl. 440; Cook v. Yarwood, 41 Ill. 115; Feasler v. Schriever, 68 Ill. 322.

Both are in effect pleas in abatement: 1 Chitty's Pl. 453; Archibald v. Argall, 53 Ill. 307; Palmer v. Gardiner, 77 Ill. 143.

The plea avers no sufficient consideration for the agreement pleaded: Archibald v. Argall, 53 Ill. 307.

A judgment *quod recuperet* is not proper on a dilatory plea: 1 Bouv. Law Dic. 760.

The judgment should have been that the writ be quashed; Scott v. Waller, 65 Ill. 181; Spaulding et al. v. Lowe et al. 58 Ill. 96; Cushman v. Savage, 20 Ill. 330.

Mr. WILLIAM M. CLEMMENS and Mr. ANDREW D. DUFF, for appellees; that amendments to pleadings where no statute intervenes, are always in the discretion of the court, cited Jackson v. Warren, 32 Ill. 331; State Bank v. Buckmaster, Beecher's Breese, 176.

The statute allows such amendments: Rev. Stat. 1874, 778, § 24; 187, § 1.

All pleas in abatement are not dilatory pleas: Humphreys v. Phillips et al. 57 Ill. 132; Buckles v. Harlan, 54 Ill. 361; Wallace et al. v. Cox, 71 Ill. 548; Drake v. Drake, 9 Chicago Legal News, 222.

The judgment as to recovery of costs was correct: Rev. Stat. 1874, 298, § 10.

Technical objections to a judgment as to matters of mere form will not be regarded on appeal: Hofferbert et ux. v. Klinkhardt, 58 Ill. 450; Rev. Stat. 138, §§ 6, 7.

TANNER, P. J. This was an action of assumpsit brought by the appellant against the appellees in the Circuit Court of Williamson county. The appellee interposed a plea in abatement to the action, setting out, in substance, that after the several causes of action occurred, they had entered into a contract with the appellant by which he, for a consideration mentioned in the

plea, was to forbear suing upon the indebtedness averred in the declaration, until the appellees could be relieved from the financial embarrassment under which they then suffered, and that although they should be so relieved within the period of one year, suit should not be instituted until the expiration of that time. A demurrer was interposed to this plea and sustained by the court. The appellees then asked and obtained leave over the objections of the appellant to file an amended plea in abatement.

The amended plea differed from the original by averring that for the consideration stated in the first plea, the appellee was not to sue on said indebtedness for the space of five years, unless the appellees should sooner become relieved from their pecuniary embarrassments.

To this plea a demurrer was also interposed and overruled by the court, and an exception taken to the ruling of the court by the appellant and he stood by his demurrer, and the court rendered judgment as follows:

"It is therefore ordered by the court, that the defendants recover of the said plaintiff their proper costs in this behalf expended."

The appellant brings the cause to this court and assigns for error the rulings of the Circuit Court in allowing an amended plea in abatement to be filed after sustaining a demurrer to the original plea.

It seems to be a rule that pleas in abatement are not amendable, because they are dilatory and do not go to the merits of the action. Tidd's Practice, 638; Chit. Pl. 465; Trindon v. Durant, 5 Wend. 72, and authorities there cited.

In *Brownell v. Yarwood*, 41 Ill. 115, the court say: "After the defendant has filed a plea in abatement to the action which has been disposed of by the court, it is irregular to file another plea of the same character, and it may be stricken from the files." Pleas in abatement are not favored by the courts, and we are not aware of any well adjudicated cases in which they are held to be amendable at common law; this view, we think, is not shaken by the authorities cited by the appellees. If such pleas could be at any time amendable in our State, the right therefor must be statutory.

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The twenty-third section of the Practice Act, in force July, 1872, provides that "at any time before final judgment in a civil suit, amendments may be allowed in any matter either of form or substance in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought, or the defendant to make a legal defense." If this section could be construed favorably for such pleas in regard to amendments, the statute of amendments in force July, 1874, clearly prohibits the amendment of such plea. The first section of the latter act provides "that the court in which any action is pending shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment." This section is in all respects the same as the statute construed in 5 Wend. *supra*, in which it was held not to confer power upon the courts of New York to allow amendments to be made to pleas in abatement. However, our legislature left no difficulty for the courts in respect to the construction of this section. The last paragraph of the last section of the act provides that "no part of this act shall extend to any plea in abatement."

If the first section can be construed as giving authority to allow amendments to such pleas, the last section of the act takes it away. "When a general intention is expressed, and the act also expresses a particular intention, incompatible with the general intention, the particular intention is to be considered in the nature of the exception." *Churchill v. Crease*, 5 Bing. 180; *Terrington v. Hargraves*, Ib. 492; Sedg. St. & C. L. 60.

The next question that presents itself for our consideration is, if the twenty-third section of the Practice Act of 1872 conferred upon the courts the power to allow amendments in this character of pleas, was it taken away by the prohibitory clause in the last section of the statute of amendments in force July, 1874? We think there is no difficulty in determining this question.

The twenty-third section of the Practice Act, and the first section of the statute of amendments are statutes *in pari materia*, and are to be taken as one statute, and construed together,

in order to arrive at the intention of the law-making body. Smith's Com.; Bruce v. Schuyler, 4 Gilm. 273.

If the twenty-third section of the Practice Act, and the first section of the statute of amendments are statutes *in pari materia*, and the power is conferred upon the courts to allow amendments to pleas in abatement by both, a repeal or limitation of one, in this regard, would be a repeal or limitation of the other. The last section of the statute of amendments is subsequent in point of legislative contemplation to both, and must be regarded as a repeal or limitation of both.

The cases referred to by appellants in support of the rulings of the Circuit Court do not militate against this view. In those cases the pleas raised the question of jurisdiction of the court over the person, under the provisions of the statute of our State, and are therefore not in conflict with the statute of amendments. In Safford v. Sangamon Ins. Co. 83 Ill. 528, the views of the court are expressed by Judge Dickey in these words: "A plea in abatement to the jurisdiction of the court is a meritorious plea, and not to be regarded as a mere plea in abatement, but one necessary to the protection of a substantial right, granted by the statute, and so the exception in the statute of amendments forbidding the amending of a plea in abatement does not embrace pleas of this character."

The plea in the case at bar is in the ordinary form of pleas to abate actions prematurely brought, and does not go to the merits of the case, but only to the right of the appellees to sue at the time the suit was instituted. After a careful consideration of authorities, and the several provisions of the statutes in reference to amendments, we must conclude that the plea in this case is embraced in the prohibitory features of Chap. 7, sec. 11, Rev. Stat. 1874.

The Circuit Court, on sustaining the demurrer to the plea, should have denied leave to amend the plea, and required the appellees to plead to the declaration.

The judgment of the Circuit Court is reversed and the cause remanded.

. Reversed and remanded.

WILLIAM C. BUCHANAN

v.

JOSIAH O. LOW.

CORPORATION—LIABILITY OF OFFICERS.—The liability of directors and officers of corporations, for indebtedness in excess of the capital stock, imposed by the general corporation law, is to the creditors as a whole, and not to any individual creditor for his debt, and such liability can only be enforced in chancery.

APPEAL from the Circuit Court of St. Clair county, the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant; that the general incorporation act does not affect corporations existing before its passage, cited Rev. Stat. Chap. 32, §§ 16, 49; Chap. 131, §§ 1, 6; Gross' Stat. 1871, Chap. 25, § 110.

The charter of a private corporation is a contract: Donworth v. Coolbaugh, 5 Clark, 300; Ireland v. Palestine, etc. Co. 19 Ohio St. 369.

An action at law will not lie: McRae v. Locke, 114 Mass. 96; Horner v. Herring, 93 U. S. 228; Turpin v. Haines, 10 Chicago Legal News, 74

Mr. THOMAS G. ALLEN, for appellee; that an action at law would lie, cited Sangamon Co. v. City of Springfield, 63 Ill. 66; Chitty's Pl. 106; Culver v. Third Nat. Bank, 64 Ill. 528; Dazier v. Thornton, 19 Ga. 325; Butler v. Walker, 80 Ill. 345; Pollard v. Bailey, 20 Wall. 525; Corning v. Hosner et al. 1 Comst. 58; Bullard v. Bell, 1 Mason, 243; Burr v. Wilcox, 22 N. Y. 557; Paine v. Stewart, 33 Conn. 516; Norris v. Johnson, 34 Md. 485; Bassett v. St. Albans, 47 Vt. 313.

As to the constitutionality of the statute: Cooley's Con. Lim. 375; O. & M. R. R. Co. v. McClellan, 25 Ill. 140; G. & C. U. R. R. Co. v. Appleby, 28 Ill. 283; C. R. I. & P. R. R. Co. v. Reidy, 66 Ill. 43.

Liability of others with defendant should have been pleaded

First National Bank of Olney v. Cope Brothers et al.

in abatement: *Lurton v. Gilliam et al.* 1 Scam. 577; 1 Chitty's Pl. 46; *Puschel v. Hoover et al.* 16 Ill. 340; *Ziele v. Ex'rs of Campbell*, 2 John's. Cas. 382; Rev. Stat. 93.

The record admissions of a party are an estoppel, and he cannot introduce evidence to rebut them: 1 Greenliff's Ev. §§ 22, 186, 205; *Stribling v. Prettyman*, 57 Ill. 371; *Hensoldt v. Town of Petersburg*, 63 Ill. 141.

BAKER, J. In this case we are of the opinion that the Circuit Court erred in overruling the appellant's motion in arrest of judgment.

The judgment of the Circuit Court is reversed, and a judgment entered in this court in favor of appellant and against appellee for costs of suit.

Our reasons for reversing this judgment are the same as those set forth in an opinion filed at this term in the case of *William C. Buchanan v. Bartow Iron Company*. [*Ante* p. 191.]

Judgment reversed.

TANNER, P. J., dissenting.

FIRST NATIONAL BANK OF OLNEY

V.

COPE BROTHERS ET AL.

APPEAL—DECREE RENDERED IN VACATION NOT FINAL.—This court has jurisdiction only in matters of appeal or writs of error from final judgments, orders or decrees. A decree filed in vacation, in the absence of any stipulation of the parties that such decree shall be final, is not such a final decree as may be appealed from.

APPEAL from the Circuit Court of Richland county; the Hon. JOHN H. HALLEY, Judge, presiding.

Messrs. CANBY & EKEY, for appellant.

Mr. J. M. LONGENECKER, for appellees.

First National Bank of Olney v. Cope Brothers et al.

BAKER, J. Cope Brothers filed a bill to the November term, 1877, of the Richland Circuit Court, for the purpose of enforcing a mechanic's lien on a certain lot and premises described therein, and made William Ratcliff and the First National Bank of Olney parties defendant to said bill. Edward S. Wilson et al. also filed a bill against the same parties for a similar lien, and the two cases were, by order of the court, consolidated. Afterward K. D. Horrall, Prunty and Jolly and G. Gaddis & Co. were severally allowed to interplead, and they filed intervening petitions praying for liens for the respective amounts claimed by them to be due for material and labor on the same building and premises described in the two bills above mentioned. At the November term of court the First National Bank of Olney answered the said several bills and petitions, and filed a cross-bill for a vendors' lien on said lot, making said Ratcliff and all of the several complainants and petitioners above mentioned defendants to said cross-bill. This cross-bill was answered and replications were filed.

At the said term of court the following order was made and entered of record in the consolidated cause, to wit:

"On motion it is ordered that this cause be referred to A.V. Miller, a special master, to take testimony and report to this court, and this cause to be submitted at Jasper Circuit Court, and decree entered as of this term."

Testimony was taken in vacation before said special master, and his report thereof was filed in the clerk's office on the 6th day of December, 1877.

Afterward, and in vacation, the court rendered a decree in the case, which was filed December 10, 1877, in the clerk's office, and it does not appear from recitals in the decree, or otherwise, that the First National Bank was present when said cause was submitted, or when said decree was announced or filed.

On the 19th day of December, 1877, and also in vacation, a supplemental order was filed in the clerk's office, reciting that the aforesaid decree had been rendered after term time, and entered as of the said term, and that neither the said First National Bank nor its attorney was present at the time of the

rendition of the decree, and thereupon granting an appeal to said Bank upon its filing bond in the sum of \$3,000, within thirty days. The Bank filed the required bond, and brings the record to this court.

In this state of the record it is only necessary to refer to one point in the case. This court has jurisdiction only in matters of appeal or writs of error from final judgments, orders or decrees. The decree filed in this case in vacation is not a final decree. The forty-seventh section of the thirty-seventh chapter of the Revised Statutes of 1874, page 332, provides that when a cause or matter is decided in vacation, the judgment, decree or order therein may be entered of record in vacation, but such judgment, decree or order may, for good cause shown, be set aside or modified or excepted to at the next term of the court, upon motion filed on or before the second day of the term, of which motion the opposite party or his attorney shall have reasonable notice, and that if not so set aside or modified it shall thereupon become final; and the section of the statute immediately following provides that if it is stipulated of record that a decree, judgment or order so entered of record in vacation shall be final, then such judgment, decree or order shall have the same force and effect as if it had been entered at the term preceding the time it is entered, subject to the right of appeal or writ of error.

In the case under consideration there was no such stipulation entered of record as is contemplated by this latter section of the statute, and it therefore follows that the decree filed in said cause in vacation is not a final decree; upon notice being given and motion filed in the Richland Circuit Court on or before the second day of the next term, it may be set aside or modified.

As the decree in question is not final, no appeal lies from it to this court, and consequently the appeal herein must be dismissed at the cost of the appellant.

Appeal dismissed.

Knight v. Knight et al.

MADISON M. KNIGHT

v.

MALINDA KNIGHT ET AL.

1. **FORCIBLE ENTRY AND DETAINER—POSSESSION.**—The plaintiff being in lawful possession of the premises, either as tenant by sufferance or otherwise, the entry of defendants was unlawful if made against the will of the plaintiff, or by force, and the action of forcible entry and detainer will lie to oust them.

2. **ABANDONMENT.**—The removal, by plaintiff, of his goods from the rooms, is not of itself an abandonment of possession, and declaring his purpose to fit them up for rent, and talking about renting them is a sufficient indication of his intention to retain control over them, to contradict the theory of abandonment.

3. **LEGAL TITLE NOT IN ISSUE.**—The question, in whom is the legal title to the premises, is one which the court cannot try in this suit.

ERROR to the Circuit Court of Wayne county; the Hon. TAZEWELL B. TANNER, Judge, presiding.

Mr. JAMES McCARTNEY, for plaintiff in error; that the plaintiff being in possession the defendants could not enter without being liable for forcible entry and detainer, cited *Reeder v. Purdy*, 41 Ill. 280; *Smith v. Hoag*, 45 Ill. 250; *Farwell v. Warren*, 51 Ill. 467; *Allen v. Tobias et al.* 77 Ill. 169; *Cook v. Rider*, 16 Pick. 186; *The People v. Field*, 52 Barb. 198; 1 *Hawkins' Pleas*, 501, § 26; *Haley v. Palmer*, 9 Dana, 321; *Davidson v. Phillips*, 9 Yerg. 93.

Possession of the house was possession of all the rooms: *Huftalin v. Misner*, 70 Ill. 55; *Broomfield v. Reynolds*, 4 Bibb. 388; *Chiles et al. v. Stephens*, 3 A. K. Marsh. 117.

Removing the furniture and locking up the house for repairs, is not an abandonment: 4 *Comyn's Dig.* 353; *Kercheval v. Ambler*, 4 Dana, 166; *Hoffstetter v. Blattner*, 8 Mo. 276; *Min-turn v. Burr*, 16 Cal. 107; *Eville v. Conwell*, 2 Blackf. 133; *Jarvis v. Hamilton*, 19 Wis. 187; *Ainsworth v. Barry*, 35 Wis. 136; 6 *U. S. Dig.* 325.

If possession was taken by force, plaintiff may recover

whether defendant had a right to enter or not: Rev. Stat. 1874, 535, § 1.

Messrs. ROBINSON, BOGGS & JOHNS, for defendants in error; that this action will not lie if the premises were vacant at the time of defendant's entry, cited Rev. Stat. 1874, Chap. 57, § 2; Reeder v. Purdy, 41 Ill. 280; Dean v. Comstock, 32 Ill. 173.

Ownership of the fee draws to it the legal possession unless there be actual adverse possession: Halligan v. C. & R. I. R. R. Co. 15 Ill. 558.

The plaintiff must have actual possession of the rooms in question: McCartney v. McMullen, 38 Ill. 237.

ALLEN, J. This was an action of forcible entry and detainer brought by plaintiff against defendant, before a justice of the peace, to recover certain rooms of a house on lot No. 21, in Fairfield, Ill. A trial was had before the justice of the peace, and an appeal to the Circuit Court. At the March term of that court, a jury was waived, and the evidence in the cause was heard by the court. Judgment for defendants for costs, and plaintiff brings the cause to this court on writ of error.

The evidence tends to show that the title to the lot, on which the house stands, was in the wife of plaintiff, and that plaintiff and wife occupied the house (except one year when it was rented). That at the expiration of that year they again took possession and retained it until death of plaintiff's wife, which occurred in the year 1871. That plaintiff continued in possession of the rooms in controversy (the remainder of the house being rented and in possession of a tenant of plaintiff) until Saturday, the 1st day of July, 1876, when plaintiff, for the purpose of having the rooms fitted up for rent, took out his household goods, locked the door, and put the key in his pocket, gave the tenant occupying the remainder of the house directions to look after the rooms or see to them.

That on the following Monday morning, between daylight and sun-up, defendants came to the house, forced up one of the windows, gained an entrance through the window and took the locks off the doors, and have since kept possession of the rooms.

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That wife of plaintiff left no issue by her marriage with plaintiff. That by a former marriage she had one son, who died, leaving defendant, Malinda Knight, his widow, and defendant, Mary A. Gash, and her sister Lucretia, his daughters.

That plaintiff claims no title in the premises, in fee, but that his deceased wife, before her death, requested him to settle up her estate, collect outstanding debts, pay what she owed, and then sell the house and lot, and divide the proceeds between himself and her two grand-daughters equally; and that in pursuance of her directions he proceeded to collect and pay out, but that owing to his inability to collect outstanding debts, he has not been able to settle up her estate, and that, in pursuance of her request, he had retained possession and control of the property in question.

The question: In whom is the legal title to this property? is one with which, in this suit, we have nothing to do, as we cannot try the question of title.

If the plaintiff was in the lawful possession of these rooms, either as a tenant by sufferance, or otherwise, the entry of defendants was unlawful, if against his will, or by force, and this action will lie to oust them. *Reeder v. Purdy*, 41 Ill. 280; *Smith v. Hoag*, 45 Ill. 250; *Allen v. Tobias et al.* 77 Ill. 169.

Defendants claim that plaintiff had abandoned possession of the rooms, and that they had a right to enter on them as vacant and unoccupied.

The mere fact that plaintiff had removed his goods from the rooms was not, of itself, an abandonment of possession; though ordinarily this fact might be so regarded where there was no other circumstances or *indicia* of his purpose to retain possession; but what are the facts as they appear in this case?

He locked the door, closed the windows, retained possession of the key, gave his tenant of the other portion of the house directions about exercising oversight over them, declaring his purpose to fit them up for rent, and had been talking with one man about renting them. All these things go to explain his motive in taking his goods from the rooms, and all contradict the theory that he had abandoned possession of and control over them. We believe this was not such an abandonment

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of possession as gave defendants the right to enter, 'and we are supported in this view by Comyn's Digest, Vol. 4, p. 353; Hoffstetter v. Blatter, 8 Mo. 276; Jarvis v. Hamilton, 19 Wis. 187; Ainsworth v. Barnes, 35 Wis.

And for these reasons this cause is reversed and remanded.

Reversed and remanded.

TANNER, P. J., did not sit in this cause, having tried the cause in the Circuit Court.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—JULY TERM, 1878.

THE COUNTY OF RICHLAND ET AL.

V.

THE PEOPLE EX REL.

1. SUBSCRIPTION TO RAILROAD—ELECTION CALLED BY WRONG AUTHORITY.—Where the act authorizing a municipal corporation to make subscriptions in aid of a railroad provides that the election shall be called by the County Court, an election called by a wrong authority, as by the Board of Supervisors, is void and confers no authority to make such subscription. The so-called vote is an idle form, and persons opposed to the subscription are under no obligation to vote against it, because they have a right to regard the entire proceeding as a nullity.

2. ADOPTION OF TOWNSHIP ORGANIZATION—DOES NOT CHANGE POWER.—The fact that upon the adoption of township organization the law requires that acts formerly to be done by the County Court shall be performed by the Board of Supervisors, cannot affect this case, because the enabling act in this case was passed subsequent to the adoption of township organization, and it will be presumed that the Legislature had knowledge of that fact and intended to confer the power to act upon the County Court instead of upon the Board of Supervisors.

3. CURATIVE ACT—CANNOT LEGALIZE A VOID ELECTION.—The election being void, a subsequent act of the Legislature legalizing the former vote is of no effect. It is the settled doctrine of this State that under the Constitution of 1848, the Legislature had no power to enact a law rendering a void election and subscription for corporate purposes valid.

4. EFFECT OF CURATIVE ACT—REVOCATION OF POWER.—At the most the curative act merely granted power to the county to subscribe, but left it

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optional with the corporate authorities to subscribe or not, as the corporate will should dictate. After the curative act, the Board of Supervisors made no further orders in regard to the subscription until after the present Constitution went into effect. There was, then, no binding contract of subscription, and the subscription already made not being under existing laws by a vote of the people, it was then too late. The power itself was revoked by the Constitution.

ERROR to the Circuit Court of Lawrence county; the Hon. JAMES C. ALLEN, Judge, presiding.

Mr. E. WILSON, Mr. J. M. LONGENECKER and Mr. M. MILLAUD, for plaintiffs in error; that statutes granting special powers are to be strictly pursued, cited *Harding v. R. R. I. & St. L. R. R. Co.* 65 Ill. 90; *Schuyler Co. v. The People*, 25 Ill. 181; *Clarke v. Hancock Co.* 27 Ill. 305; *Marshall Co. v. Cook*, 38 Ill. 44; *Chestnutwood et al. v. Hood et al.* 68 Ill. 139.

The election was called by the wrong authority and is void: *Schuyler Co. v. The People*, 25 Ill. 181; *Marshall Co. v. Cook*, 38 Ill. 44; *Force et al. v. Batavia*, 61 Ill. 99; *Clarke v. Hancock Co.* 27 Ill. 305; *Harding v. R. R. I. & St. L. R. R. Co.* 65 Ill. 90; *People v. Town of Santa Anna*, 67 Ill. 57; *People v. Logan Co.* 63 Ill. 374.

The court is bound to take judicial notice that at the time the act was passed the county was under township organization: *County of Rock Island v. Steele*, 31 Ill. 543; *Schuyler Co. v. The People*, 25 Ill. 181.

The election was to be held in the same manner as elections for state and county officers, hence registration was indispensable: *People ex rel. v. Town of Santa Anna*, 67 Ill. 57; *People ex rel. v. Town of Laenna*, 67 Ill. 65.

Notices for the election must be signed by the proper officer: *Force et al. v. Batavia*, 61 Ill. 99; *Harding v. R. R. I. & St. L. R. R. Co.* 65 Ill. 90; *Marshall v. Silliman*, 61 Ill. 218.

If the first election was a proper exercise of authority, then the power was exhausted, and the subsequent vote wholly unauthorized: *Ill. Midland R. R. Co. v. Supervisors, etc.* 9 *Chicago Legal News*, 364.

The legislature cannot by a subsequent enactment legalize the void election: *Marshall v. Silliman*, 61 Ill. 218; *Wiley v.*

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Silliman, 62 Ill. 170; Town, etc. v. Treas. Iroquois Co. 9 Chicago Legal News, 353; Town of Elmwood v. Marcy, 2 Otto, 289.

Nor can the county authorities ratify such proceedings, or the taxpayers be estopped: Ryan v. Lynch, 68 Ill. 160; People ex rel. v. Town of Santa Anna, 67 Ill. 57.

Mr. FREDERICK ULLMAN, for defendant in error; That on the change to township organization the board of supervisors were authorized to call the election, cited Prettyman v. Supervisors Tazewell Co. 19 Ill. 406; Marshall Co. v. Cook, 38 Ill. 44.

An amendment to a statute will be construed as if it had been originally copied into the statute: Holbrook v. Nichol, 36 Ill. 161.

Mere irregularities in conducting the election will not relieve the county from liability: Hancock Co. v. Clarke, 27 Ill. 305.

The action of the county was legalized by a subsequent act of the legislature: Cowgill v. Long, 15 Ill. 202; Ryan v. Lynch, 68 Ill. 160; Burr v. Carbondale, 76 Ill. 455.

Registration was unnecessary: People v. P. L. & D. R. R. Co. 63 Ill. 375.

BAKER, J. In this case is involved the question of the liability of the county of Richland for an alleged subscription of \$150,000 to the capital stock of the Grayville & Mattoon Railroad Company; that it is claimed was authorized by a vote of the people of the county at an election held on the 7th day of April, 1868, and made by an order of the Board of Supervisors of the county, on the 11th day of December, 1868.

It is evident that such subscription cannot be sustained under the general act of November 6th, 1849, as under said act subscriptions could not exceed the sum of \$100,000: Laws 2nd Sess. 1849, 28.

We must look, therefore, for power to make said subscription either to the act approved March 1, 1867, amendatory of the act incorporating said railroad company, or to the provisions of the curative act of April 9, 1869, P. L. 1867, Vol. 2, 736; P. L. 1869, Vol. 2, 360.

The second section of the act of March 1, 1867, is as follows:

“Section 2. Cities, towns and counties shall be authorized to subscribe for stock in the said company, in like manner and with like effect as is provided in and by the act entitled ‘An act to provide a general system of railroad corporations, approved November 5, 1849,’ and the several acts amendatory thereof. Provided, that the County Court of any county may, having first submitted the question of subscription to the vote of the people of the county, subscribe for stock in said company, payable in lands, or town or city lots, to be taken upon such terms and conditions, and be conveyed in such manner as the said court and the said company may agree upon, and that the said subscription shall not exceed two hundred thousand dollars; and the said subscription may be made partly payable in lands, and partly payable in money, as the said court and the said company may agree.”

The body of this section, so far as the county is concerned, did nothing more than to expressly authorize it to do that which it was already fully authorized to do under the general law of 1849. If the section had stopped right there and had contained no further provision or proviso, the Board of Supervisors alone would have been authorized to call the election and the amount voted could not have exceeded \$100,000. As the section stands with the proviso, the board of supervisors, and probably they alone, had authority, in so far as any power predicated upon the body of the section is involved, to call an election and subscribe. *Prettyman v. Supervisors of Tazewell County*, 19 Ill. 406; *Supervisors of Marshall Co. v. Cook*, 33 Ill. 44. Under the body of this section the powers of the Board of Supervisors were no way changed from what they were under the law of 1849, and they had no more authority to call an election for a subscription of \$150,000 under the body of this section than they had under the general law.

We do not understand the *proviso* to this second section, to confer any additional power or authority whatever upon the Board of Supervisors. A *proviso* is something engrafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of the general enactments, and

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providing specially for them. Potter's Dwarria, 118. Most usually a proviso has the effect of limiting, and not of enlarging the body of the act; but this may be otherwise. Suppose the legislature had provided in express terms that the Supervisors of their own motion, and without any vote of the people, might subscribe not exceeding \$100,000 to the capital stock of a railroad company, and at the same time had attached a proviso to the act providing that in case the proposition to subscribe was first submitted to a vote of the people, then, in the event such subscription was authorized by such vote, the subscription might be for some larger sum. In such a case the evident effect of the proviso would be to enlarge, at least so far as amount is concerned, the body of the act.

So, by the proviso in this section, we understand the body of the act to be enlarged, and the legislature to intend that the County Court, as distinguished from the Board of Supervisors, may submit to the vote of the people a proposition to subscribe for stock in said company a sum that might be larger than \$100,000, but not exceeding \$200,000, said subscription to be payable in lands or town or city lots, or partly in lands and partly in money, upon such terms and conditions as the County Court and said company might agree. As to whether the power to call elections and make subscriptions vested in the Board of Supervisors under the act of 1849, and recognized in the body of said second section of the act of 1867, and the power vested in the County Court by the proviso to said second section are cumulative, and might have been concurrently exercised, we are not called upon to determine.

The only power granted to call an election for a subscription in excess of \$100,000, is vested by the terms of this proviso in the County Court. At the time that this act was passed the county of Richland was under township organization, and this Court is bound to take judicial notice of that fact. County of Rock Island v. The State Bank, 31 Ill. 343. And it must be presumed, also, that the legislature knew that fact, and shaped the act of 1867 accordingly. Supervisors of Schuyler Co. v. The People, 25 Ill. 181.

It is provided in this second section that "the County Court "

having first submitted the question to a vote of the people, might subscribe for stock in said company upon certain terms, "as the said court and the said company" might agree upon, and that said subscription might be made partly payable in lands and partly in money," as the said court and the said company might agree. It is provided in section three of the same act that "any County Court subscribing for stock in said company shall be authorized to issue bonds in payment for the same, in the name of the county;" and it is provided in section four, that the county clerk shall from year to year extend a tax "sufficient to pay the interest accruing upon the bonds so issued by the County Court." It is a well settled rule of construction that statutes extending the powers of corporations, or increasing the burdens of taxation, must be strictly construed. *Smith's Com.* 818; *Chestnutwood v. Hood*, 68 Ill. 132.

We think it clear that this case falls within the rule announced in *Supervisors of Schuyler Co. v. The People, supra*. In that case all the acts required by the two laws then in question were required to be done by the County Court, and they were in fact done by the Board of Supervisors. In this case all the acts required to be done by the proviso to section two, and by the subsequent section, are required to be done by the County Court, and in so far as they have been done at all, have been done by the Board of Supervisors. In that case as in this, the legislative enactments were subsequent to the adoption of township organization. In that case it was presumed that the legislature knew that the county had adopted township organization, and that it intended to confer the power upon the County Court instead of the Board of Supervisors. In this case, the same presumptions must prevail.

It is true that, under the law of 1849, the County Court was required to call the election and make the subscription; also that in *Prettyman v. Supervisors of Tazewell Co., supra*, it was expressly held that the effect of the adoption of township organization by any county, upon this very law of 1849, was to transfer to the Board of Supervisors the duty and power of submitting to the people the question of subscribing for stock in a railroad company; and also that it was decided in the

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Supervisors of Marshall Co. v. Cook, *supra*, that an election held under the provisions of the law of 1849, called by the County Court after the county had adopted township organization, was without authority of law, and that a subscription of stock based on such election was absolutely void. But these decisions are based altogether upon the law of 1849, and proceed upon the ground that the fifth clause of the fourth section of article sixteen of the township organization law of 1851, which requires the Board of Supervisors to perform all other unspecified duties not inconsistent with the act, which were required or enjoined upon the county courts by any law of the State, operated as an amendment, *pro tanto*, to the law of 1849. G. L. 1851, 51. An amendment to a statute will be construed to operate precisely as though it had been originally copied into the statute, so far as regards any action had after the amendment is in force. See *Holbrook v. Nichol*, 36 Ill. 167. The act now under consideration, and the acts before the court in the Schuyler county case, are alike private acts, and in no proper sense to be regarded as amendments to the general law of 1849. It is suggested that the *Prettyman* case was decided at the April term, 1858, and the *Marshall* county case at the April term, 1865, of the Supreme Court, and it is urged that therefore the decisions in said cases enter into the construction of this private act of 1867. Said cases have nothing at all to do with the construction of the proviso now in question, because the principle therein announced has no application here, the premises being essentially different. Chief Justice Caton said, in *Schuyler Co. v. The People*, "there has been no subsequent law giving the least color to say that the power has been transferred from the County Court, where it was expressly vested, to the Board of Supervisors." In the two cases referred to by defendant in error, this element of a subsequent law to transfer the power was present, and was the controlling and efficacious element, while in this case, that element is altogether wanting. It might, with much propriety, be said in answer to the argument of defendant in error in that behalf, that the decision of the court in the *Schuyler Co.* case, made in 1860, enters into the construction of this act of 1867,

and indicates clearly that it was the legislative intent that the County Court and not the Board of Supervisors, should be clothed with the powers that are now the subject of examination.

This power to submit the question of a subscription in excess of \$100,000, and subscribe the same, was vested in express terms in the County Court, and, as we have seen, the Board of Supervisors had no authority whatever to call an election for a subscription of \$150,000. Then the election at issue was called by a wrong authority, and the whole proceeding is void. *Clark v. Supervisors of Hancock Co.* 27 Ill. 305; *Supervisors of Schuyler Co. v. The People*, *supra*; *Marshall Co. v. Cook*, *supra*; *Force v. Town of Batavia*, 61 Ill. 99; *Harding v. R. R. I. & St. L. R. R. Co.* 65 Ill. 218. The so-called vote was an idle form, and persons opposed to the subscription were under no necessity or obligation to vote against it, because they had a right to regard the entire proceeding as a nullity.

The next point that demands our attention is as to the effect of the third section of the act approved April 9, 1869, upon this alleged subscription. P. L. 1869, Vol. 3, 360. That section is as follows: "All elections held for the purpose of voting said stock, and the manner in which said stock was voted, are hereby legalized in all respects, and said stock to be subscribed in the manner the same was voted."

Under the Constitution of 1848, it was entirely competent for the legislature to bestow directly upon the county, and without requiring that there should first be a vote of the people, the power to subscribe for stock in railroad companies. *President and Trustees of Town of Keithsburg v. Frick*, 34 Ill. 405. But in such case the mere granting the power to subscribe would not be a subscription, and the proper corporate authorities would have the election to avail themselves of the power granted, or not, just as they saw fit; and there would be nothing binding upon the county until such corporate authorities had actually made a subscription under the power. It is the settled doctrine in this State, that under the Constitution of 1848, the legislature had no power to pass a law rendering a void election and subscription for corporate or local purposes

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valid, and thereby compel such corporation to incur a debt against its own wishes for such purposes. See *Marshall v. Silliman*, 61 Ill. 218, and cases cited therein; *Wiley v. Silliman*, 62 Ill. 170; *Township of Elmwood v. Marcy*, 92 U. S. 289; *C. & St. L. R. R. Co. v. City of Sparta*, 77 Ill. 505.

If we are correct in our conclusion, that the election held on the 7th day of April, 1868, upon the proposition to vote a subscription of \$50,000 to the capital stock of the Grayville & Mattoon Railroad Company, was a nullity, for the reason that said election was called by a body that had no power to call such election, then it follows that the subsequent subscription order, made on the 11th day of December, 1868, by the Board of Supervisors, so far as it was based upon this election, was also a nullity. Such subscription order, in so far as it assumed to subscribe \$150,000 to the capital stock of the relator, was made without any legislative authority whatever, either direct or indirect, and was absolutely void.

In April, 1869, the curative act above referred to became a law. If there has been any power or authority in the supervisors to subscribe the \$150,000 in controversy, it must be by virtue of the above quoted third section of this act. If said section was self executing, and if its effect was to render valid and binding against the county, without the subsequently expressed assent of the corporate authorities thereof, this void election and void subscription, then said section was a violation of the Constitution. The election and the subscription were both accomplished facts and both nullities, and the legislature could not, without the corporate consent, breathe into them the breath of legality and life, and make them a valid corporate debt. But we do not so interpret this act of 1869. At most, it merely granted power to the county to subscribe, if it even did that, but left it optional with the corporate authorities to subscribe or not, just as the corporate will should dictate.

After the date of this curative act, the board of supervisors made no further orders in regard to this alleged subscription until the 12th day of December, 1871. We have deemed it unnecessary to examine as to the character of the orders made at that date and afterwards. It was then too late for the board

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to make the county a subscriber to the capital stock of relator for this sum of \$150,000 by any order that it might assume to make and enter upon its records.

The present Constitution went in force on the 8th day of August, 1870, and it provided in express terms that no county, city, town, township, or other municipality, should ever become subscriber to the capital stock of any railroad or private corporation, or make donation to or loan its credit in aid of such corporation, except in cases where such subscriptions had been authorized, under existing laws, by a vote of the people of such municipalities prior to the adoption of said Constitution. At the date this constitutional provision went in force there was no binding contract of subscription, and the subscription of the \$150,000 was not authorized, as we have seen, "under existing laws by a vote of the people." *Jackson Co. v. Brush*, 77 Ill. 59; *Middleport v. Aetna Life Ins. Co.* 82 Ill. 562. It follows, therefore, as a necessary result, that the corporate authorities of the county having failed to exercise the power conferred upon them by the curative act of 1869, until after the Constitution of 1870 went in force, the power itself was revoked by that Constitution.

We are of the opinion that the Circuit Court erred in finding for the relator and awarding the peremptory writ of mandamus, and in rendering judgment against plaintiffs in error for costs. The judgment is reversed and the cause remanded.

Reversed and remanded.

ALLEN, J., took no part in the decision of this case.

CITY OF EAST ST. LOUIS

V.

JAMES GIBLIN, Adm'r.

1. CITY—LIABILITY FOR ACTS OF SERVANTS—WHETHER SERVANT OR CONTRACTOR.—If a person is employed by a city, in the character or relation of servant, to remove obstructions from the streets—as cutting down a tree—and by reason of the negligent, careless manner in which the work is done,

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an injury results, the city would be liable for all damages occasioned thereby: but where the evidence shows that the mayor let the cutting of the tree to one C. for a stipulated sum; that C. employed men to assist him, who were under his control; *held*, that C. was an independent contractor, and the city was not liable; and the question whether the relation of master and servant existed between the city and him should not have been submitted to the jury.

2. MAYOR—DUTY TO PROTECT CITIZENS.—It is not the duty of the mayor of a city, by virtue of his office, to see that the lives and property of the citizens are properly protected. The powers and duties of mayor are wholly of an executive nature, and must be conferred or enjoined upon him by legislative enactment or municipal ordinance. The act creating the municipality of this city does not impose upon him such duty, nor does the record contain any ordinance that enjoins it upon him.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. R. A. HALBERT and Mr. J. M. FREELS, for appellant; that before the city would have had authority to order the tree cut, it must, by ordinance, have declared it to be a nuisance, cited *City of Chicago v. Laffin*, 49 Ill. 172.

Declaring it a nuisance would not make it so if in fact it was not: *Ewbanks v. Ashley*, 36 Ill. 177; *Yates v. Milwaukee*, 10 Wall. 497; *Dillon on Mun. Cor.* § 308.

The property of a citizen cannot be taken without a trial and judgment of a court of competent jurisdiction: *Bullock v. Goemble*, 45 Ill. 218; *Willes v. Legris*, 45 Ill. 289.

A municipal corporation is not liable for the unauthorized acts of its officers in administering an ordinance: *Trustees v. Schroeder*, 58 Ill. 353; *Wood on Master and Servant*, § 466; *McDonald v. English*, 85 Ill. 233.

Proof that a judgment had been recovered against the city for services in cutting the tree, should not have been admitted. It was irrelevant and prejudicial: *Gilbert v. Bone*, 79 Ill. 341.

If the tree was cut under a contract, the city would not be liable for the negligence of the contractor: *Hale v. Johnson*, 80 Ill. 185; 51 Pa. St. 475; 3 Gray, 349; 4 Allen, 138; 38 Barb. 653; 46 Pa. St. 213.

There was no evidence supporting plaintiff's instructions, and they should not have been given: *Nichols v. Bradsby*, 78 Ill. 44; *Ryan v. Donnelly*, 71 Ill. 100; *Reinback v. Crabtree*,

77 Ill. 182; Drohn v. Brewer, 77 Ill. 280; T. W. & W. R'y Co. v. Ingraham, 77 Ill. 309.

All reference to negligence of the deceased is excluded from the instructions: St. L. & S. E. R'y Co. v. Britz, 72 Ill. 256.

Mr. JAMES M. DILL, Mr. WM. C. KUEFFNER and Mr. THOMAS QUICK, for appellee; that the city had adopted the acts of the person cutting the tree, and is liable for the consequences, cited Dillon on Mun. Cor. § 770.

Though the work was done by a contractor, it was under the direction of the city, and it is liable: Nevins v. Peoria, 41 Ill. 502; Chicago v. Dermody, 61 Ill. 431.

TANNER, P. J. This was an action of trespass on the case brought under the provisions of Chapter 70 Rev. Stat. 1874, to recover damages for the killing of Ellen Giblin. The cause was submitted to a jury and a verdict returned in favor of the appellee for fifteen hundred dollars. A new trial was asked, but denied, and judgment rendered for the amount of the verdict and costs. The cause is brought to this court by appeal and various errors assigned as cause for reversal of the judgment.

First. That all instructions given for appellee were erroneous.

The jury were instructed that "if they believe, from the evidence, it was the duty of the city authorities to provide for the safety and security of its citizens, and to keep the streets and alleys in a condition for persons to travel thereon, and to prevent obstructions getting on said streets and alleys, and that the city employed Carroll as its servant, to cut down the tree in question in pursuance of that duty, because there was danger of the same falling and obstructing the adjacent alley, or injuring persons residing near it, and that the city, by the same agent or servant, negligently so cut and felled said tree as to cause the injury so complained of, when by the exercise of due and proper skill and care the accident might have been avoided, then the jury must find for the plaintiff."

If Carroll had been in the employment of the city in the

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relation and capacity of a servant, and was careless or negligent in the performance of the work, the city would clearly be compelled to respond to all damages arising from the act. But does the evidence show this state of case? We think it does not. The record is neither silent nor contradictory upon this point. The appellee states that he heard a conversation between Carroll and the mayor, in which the mayor said: "Carroll, I have got another job for you; I want to get that big cottonwood tree down there between Third and Fourth and St. Louis avenue, cut down." Carroll said it was worth ten dollars to cut it and the mayor said he thought it was worth that much. Carroll states that he was employed by the mayor to cut the tree for the sum of ten dollars; that he employed men to assist; that they were under his control and paid by him. This is all of the testimony in relation to the employment of Carroll to do the work, and it does not even tend to show that the relation of master and servant existed between the appellant and Carroll. But it very clearly shows that Carroll was an independent contractor; that he performed the work for a stipulated price, and employed his own assistants; that they were under his own control and by him paid for their service. We are therefore of opinion that the court erred in giving to the jury the consideration of the question as to whether the relation of master and servant existed between appellant and Carroll. Further, the record shows that no negligence characterized the conduct of the mayor in the selection of the person to do the work. Carroll states that he had cut down as many as a hundred trees before this for the city, and his general competency to do such work is not questioned by the appellee. Shearman and Redfield, in their treatise on negligence, lay down the doctrine upon this point in these words: "One who contracts to do a specific piece of work, furnishing his own assistants and executing the work either entirely in accordance with a plan previously given to him by the person for whom the work is done, without being subject to the orders of the latter in respect to the details, is clearly a contractor and not a servant." And this is the doctrine of our own court. *Scammon v. The City of Chicago*, 25 Ill. 424; *Hale v. Johnson*, 80 Id. 185.

The cases cited by the appellee do not to the least extent shake this doctrine, but they only hold that wherever the employer retains or exercises any controlling or supervising power over the employee in the performance of the work, the rule is different. This undoubtedly is the rule, but the evidence in the case at bar does not admit of its application.

If it be conceded that Burke, in his testimony, uttered the truth in stating that the mayor was present at the falling of the tree, still it does not appear that he gave any directions or even spoke to Carroll in reference to the manner of doing the work. This isolated fact cannot be made the groundwork for any instruction to the jury from which even an inference can be drawn to establish the relation of master and servant between the city and Carroll.

Again, we think the instruction open to just criticism in authorizing the jury to determine a question of law.

In the second instruction, the jury were told that it was the duty of the mayor of East St. Louis, as the chief executive officer of the city, to see to the protection of the life and property of the citizens of said city; and that if in the exercise of that duty, under the law and within the scope of his official authority, he thought it necessary to cut down the tree in question, he had the right in behalf of the city to employ Carroll to cut the tree, and his acts in so doing, provided they were done by virtue of his lawful authority, would bind the city; therefore, if the jury believe from the evidence that under such circumstances Mayor Hake did employ Carroll to cut the tree, and that the cutting of it was necessary to protect the life and property of said citizens, then his acts in this behalf would bind the city."

The first proposition embodied in this instruction makes it the duty of the mayor, by virtue of his office, to see that the lives and property of the citizens of the city are properly protected. We do not think this, as a proposition of law, can be maintained upon principle and authority. The act of the General Assembly by which the municipality of this city was created does not impose such duty, nor does the record contain any ordinance that enjoins upon him such duty. The powers and

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duties of the mayor are wholly of an executive nature, and must be conferred or enjoined upon him by legislative enactment or municipal ordinance. Dillon, in his work on Municipal Corporations, Chap. '9, § 147, says; "The mayor is the head officer or executive magistrate of the corporation, but it is important to bear in mind that all his powers and duties depend entirely upon the provisions of the charter or constituent act of the corporation, and valid by-laws passed in pursuance thereof. It is usually made his duty, however, to see that municipal ordinances are executed."

The instruction then tells the jury "that if in the exercise of this duty under the law and within the scope of his official authority, the mayor thought it necessary to cut down the tree, * * * then he had the right to employ Carroll to cut the tree, and the city would be bound by his act." It is not clear to us as to what is meant by this part of the instruction.

If it is to be construed as telling the jury that when the mayor proceeded to discharge such duty according to municipal ordinance, it was error, because no ordinance was given in evidence which enjoined upon the mayor such duty. Again, the jury are told that if the mayor employed Carroll to cut the tree, and that the cutting of it was necessary to protect the life or property of the citizens, then the act of the mayor in this respect would bind the city.

We have examined the record carefully and have been unable to find any testimony showing or tending to show that the lives or property of the citizens were in any wise directly or remotely jeopardized by the tree in question. The justification for the act of the mayor and the supposed consequent liability of the appellant, should not be sought outside of the evidence given to the jury.

Other errors are assigned, but as the cause must be reversed and remanded for the errors already noticed, and those remaining relate mainly to matters of evidence, we think further examination unnecessary.

Reversed and remanded.

THE ILLINOIS CENTRAL RAILROAD COMPANY

v.

SAMUEL BROOKSHIRE.

1. EVIDENCE—IRRELEVANCY.—The declaration containing no allegation or charge against the appellant, of negligence by reason of running the engine at a high rate of speed, it was error to admit evidence tending to show the speed with which the engine was running at the time of the alleged injury.

2. CONTRIBUTORY NEGLIGENCE.—Where the plaintiff's own act contributed to the injury, he cannot recover unless his negligence was slight, and that of the defendant gross in comparison. So, where it appears that the plaintiff was injured by a truck being struck by a passing engine, and it also appears that but for the plaintiff's act in pushing the truck around it would not have been hit by the engine, this was such negligence on his part as will preclude his right to recover, unless it were gross negligence on the part of the railroad company in allowing the truck to remain in that position.

3. RAILROADS—REMOVAL OF OBSTRUCTIONS.—The railroad company had provided a safe and convenient way of approach to the depot, and if the plaintiff could not with safety to himself proceed in the direction he had chosen it was his duty to have retraced his steps, and approached by the way provided by the company. The truck standing in a place appropriated by the company for its own use, and not intended for the use of the public, it was not an obstruction that it was bound to remove.

4. NEGLIGENCE—A QUESTION FOR THE JURY—RULE AS TO.—What constitutes ordinary diligence and what is negligence are inquiries to be answered by a jury, but courts are bound to see that these facts when found by the jury rest upon evidence.

APPEAL from the Circuit Court of Union county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Messrs. GREEN & GILBERT, for appellant.

Messrs. LINEGAR & LANGSDEN, for appellee.

TANNER, P. J. This is an appeal from a judgment obtained by Samuel L. Brookshire in an action on the case against the I. C. R. R. Co., for its alleged negligence in allowing a baggage truck to stand upon the sidewalk, with one end projecting over the railway track during the passing of locomotive, whereby he received personal injury.

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The jury returned a verdict for seven thousand dollars; a motion for a new trial was overruled and judgment rendered for the amount of the verdict with cost.

To reverse this judgment the railroad company appeals, and assigns for error:

1st. The refusal of the court to carry the demurrer to the first plea back to the declaration.

In this we think there was no error. The declaration avers that the defendant "*carelessly and negligently* allowed the truck to project over the track," and this is all that seems to be required by approved precedents.

Hence, we are of opinion that the phraseology of the charging part of the declaration required of the appellee the same strictness of proof that would have been required had he alleged that the company knowingly permitted the truck to so stand.

Again, it is urged that improper testimony was admitted to go to the jury over the objection of the appellant. This error is well taken. Several witnesses were examined with reference to the speed with which the locomotive passed the platform or sidewalk, and some stated that its speed was very fast. This testimony was irrelevant, and doubtless had an influence upon the jury. The declaration charges no carelessness or negligence in operating the locomotive or train of cars at the time of the injury, and there being no allegation of negligence in this respect, the appellant had no notice that such testimony would be offered, therefore the testimony should have been rejected. *I. C. R. R. Co. v. McKee*, 43 Ill. 119. It is insisted, also, that the court erred in not granting a new trial. This brings us to an examination of the testimony. It appears that the passenger depot building at Anna, where the appellee received his injury, is located twenty feet east of the main track, and the space between the track and building is filled by a platform, which extends near one hundred feet south along the track; about one hundred feet further on, in the same direction, stands a water-tank, used to supply locomotives with water; its distance from the track is less than seven feet; a fence extends from the platform to the tank, running with and twelve feet from the track; below the platform and extending

near to the tank were two parallel planks, put down for the purpose of moving the truck (which belongs to and was used by the express company), from the platform to the place where it was kept when not in use—which was at the side of the fence, and close to the tank. Below, and close to the tank, from 1853 to 1863, the railroad company had a woodshed, and the space between it and the track was covered by a platform, used for the purpose of stacking wood to be used on its locomotives. About 1863 the use of wood was abandoned and the woodshed and platform were removed, and a cinder walk put down along the track and extending to a considerable distance south, for the convenience of the employes in operating the road. The proprietor of the hotel known as the "Winstead House," situated across the street, and east of the track, for the convenience of the patrons of the house, and transporting baggage, constructed a plank walk leading across the street and terminating at the tank. A suitable, convenient and safe way or approach leading eastward to and from the north end of the depot to the "European Hotel" was constructed and maintained by the company from 1853 to the time the appellee was injured. The citizens of Anna, however, used the way leading to the depot by the tank rather more than the one leading eastward, and without any objection being made by the company. The tank was located with reference to the wants and convenience of the company, more than twenty years prior, and the space between it and the railroad track was constantly wet, more or less, by leakage and by waste, at the time of supplying the locomotives, which occurred about eight times per day. The proper use of the tank rendered it impossible to fence or obstruct the way leading by it. The appellee was seventeen years old, a solicitor of patronage for the "Winstead House," visited seven trains per day, and always by the way of the tank. At the time of the injury he was running rapidly to meet an incoming train; he was cognizant of the existence and usual locality of the truck, and frequently used it himself in the transportation of baggage. The passing locomotive of appellant struck the truck and forced it and the appellee upon and through the side of the tank, breaking one leg and one arm, and rendering amputation of the latter limb necessary.

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Of the foregoing facts there is no dispute. But as to the circumstances which led directly to the infliction of the injury, there is some discrepancy in the statements of the witnesses.

The appellee testifies: I was going from the Winstead House to the train at the time of the accident, in a trot; when I got to the corner of the tank I got caught with the truck; that the engine shoved through the wall of the tank; I did not see the truck until it struck me; the truck belonged to the express company; it was a long one with four wheels—two in the center and one at each end—but did not balance on center wheels; we used the truck to carry baggage to the hotel; I don't know that I used it alone, but I have helped to take it over quite a number of times.

John Lard testifies: I saw plaintiff going to the train; I heard a crash; went over; saw plaintiff lapped around a pair of trucks; they had caught him about the upper end of his leg and bent him over.

James Firestone says: Immediately preceding the accident I passed the trucks; they were between the track and tank, and stood diagonally; met the boy half-way between tank and Winstead House; I saw nobody about freight house except Mr. Bush; I walked on the track to go around one end of the truck; one end was kinder leaning towards the tank; one end was turned over towards the track a little; one end was leaning over towards the tank and one end was bearing towards the track; it looked like the handles were pretty close to the ties; the ties project more than fourteen inches beyond the iron rail; I can't fix any distance; it might have been six inches from the end of the ties, but can't say; the boy was going to the train in a trot, as he usually did.

Alfred Firestone states that about four or five minutes before the train arrived, he saw the truck on the platform. It was pretty near between him and the tank; it was somewhere along there; it was kind of between him and the tank; it was more up towards the upper end—the north end. The evidence of appellee and James Firestone is all that in anywise tends to support the charge as to the projection of truck. These witnesses are completely overwhelmed. John D. Windman states that

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he had several conversations with appellee as to the accident, and he states that the truck was in a narrow passage near the tank, and he tried to push it out of the road. He thought he could do it before the train would strike it; but by moving it, he was caught by the train. John Allen states that on the morning following the accident, he went to appellee and asked him how it occurred, and appellee said he was running to the caboose after passengers; and when he passed the south end of the tank the truck was there, and he took hold of it to move it out of the way, and it caught in the engine and run him through the tank.

A. M. Stone testifies: I saw the boy the next morning after he got hurt, and he told me he was running to the caboose for passengers, and went around the tank, and thought there was not room enough to get by the truck, and he caught hold of it to turn it a little, and turned it too far, and the tender step caught it. The witness further stated that he was the engineer driving the locomotive that collided with the truck; that he saw the truck as the train was approaching, and looked at it to determine whether it was close enough to the track to be in the way of his engine, and he was satisfied it was not.

George Galvin states he saw the boy have hold of the truck, and was backing some four or five steps with it, and all of a sudden it went through the tank; he must have been two or three feet north of the tank when my eye fell on him backing the truck.

A. D. Bush states that, right after the accident I went and examined the tank; the marks on it were made by the handles scraping against it.

James Collins testifies: As the train was coming in I saw Samuel Brookshire come running around the corner of the tank; I was twenty-five or thirty feet north of the tank; the truck was standing straight with the track—I mean parallel with it; it was some distance from the track, outside of the end of the ties; saw Brookshire run up to the truck, and his hand touched the right handle of the truck, when it swung around and the step of the tender struck it and that knocked him down, and as he got half way up, some part of the box-car

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struck it and knocked him through the tank; can't say whether he took hold of it or just pushed it; I simply saw him put his hand on the truck, then it swung around and came in collision with the step of the tender.

William King: I noticed the truck as the train was coming in; it stood about two feet from the track and parallel with it, and a little north of the tank; my judgment is that the train would not have struck it; I could see it perfectly plain.

William Kratzinger: I examined the tank soon after Brookshire was hurt; it struck first on the northwest corner of the tank; it broke off the two next batten, and then broke into the house.

James Brookshire, father of the appellee, in rebuttal, states: I was in the room when Allen and Stone came there, the morning after the accident; if Samuel said anything to them about having taken hold of the truck to push it, I did not hear it; I was sitting on one side of the bed and they were on the other; if that conversation had taken place, I think I would have heard it.

Samuel Brookshire recalled: I heard the expression of Stone and Allen; I did not make use of any such expression; I do not know of having any conversation with Mr. Windman; I may have told him I took hold of the truck to save myself.

The foregoing is substantially all of the testimony upon the disputed points, and from it we do not hesitate to hold that it does not warrant the verdict and judgment against the appellant.

The way leading to the depot by the tank was not prepared for the use of the public, but solely for the convenience of the servants of appellant in the operation and management of the road. The tank could not be conveniently located at a greater distance from the railroad track. It furnished water to every train passing upon the road. The space between it and the road was kept constantly wet by leakage and waste-water. From these causes it could not be rendered adequate to the wants of the public in its intercourse with the appellant. From the time the depot was constructed to the time of the injury of the appellee, the appellant maintained a good, convenient

and safe approach to its depot, in an easterly direction, for the accommodation of the traveling community; and although the citizens of the south part of the city used this way in going to and from the depot without protest, the appellant's right to its enjoyment was not thereby lost or abridged. The use of the truck on this route was incidental to the business of the company, and this was known to the appellee.

The appellant in nowise invited the public to the use of this route to its depot, and we think was in nowise required to keep it clear of obstructions. If the truck impeded the appellee in his going to the depot, he should have retraced his steps and proceeded by the approach prepared and maintained for the purpose by the appellant—which was only about thirty yards further—but he elected to attempt a removal of the truck, and by so doing directly contributed to bring upon himself the injury. So long as no motive power was applied to the truck, no injury of the character complained of could have happened; and if the company was under no obligations to remove the obstruction, appellee could not remove it and complain of injury thereby incurred.

The truck stood upon the walk north of the tank, and parallel, or nearly so, with the line of the railroad track, and was brought in contact with the locomotive or tender by motive power, carelessly applied by the appellee. No negligence is charged to the appellant in the management of the locomotive by its servants. Now, if it were negligence in allowing the truck to stand upon the sidewalk, or side-way, was it gross, or ordinary negligence?

We do not see how the injury which the appellee received could be reasonably foreseen or anticipated by the appellant in the standing of the truck upon the side-way between the tank and platform. No person was in peril from passing trains so long as it remained stationary, and no reasonable inference could be drawn as to the occurrence of an injury in the manner of that disclosed in this record, and hence we think the appellant cannot be said to have been guilty of gross negligence.

To enable the appellee to recover, his negligence should be slight when compared with that of the appellant, and his

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gross. Schmidt v. Chicago and Northwestern R'y Co. 83 Ill. 405; I. C. R. R. Co. v. Hetherington, 1b. 511; I. C. R. R. Co. v. Hammer, 72 Ill. 348.

This rule of law in reference to comparative negligence, when applied to the evidence found in this record, impels us to interfere in behalf of the appellant, and when we do so, we are not unmindful that what constitutes ordinary diligence and what is negligence, are inquiries to be answered by a jury; but courts are bound to see that these facts, when found by a jury, rest upon evidence. Indeed, were it otherwise, our corporations, public and private, at times would be left to a hard fate. If courts, in their adjudications, could be guided by sympathy, the appellee would rest securely upon his judgment, but the stern mandates of justice render it otherwise.

There are various other errors assigned, but we think for the purposes of another trial they need not be considered. For the several errors indicated, the judgment of the Circuit Court will be reversed and the cause remanded.

Judgment reversed.

JAMES RECTOR, Adm'r,

v.

DAVID REAVILL.

1. ADMINISTRATION OF ESTATES—WIDOW'S AWARD—A DEMAND AGAINST ESTATE.—Where a widow elects to take the amount of the appraised value of her award in money, she has a demand against the estate, and it is not less so when it becomes necessary to resort to the sale of real estate for its discharge.

2. MAY BE PAID OUT OF REAL ESTATE PROCEEDS.—When the personal estate is insufficient to pay the widow's award in full, the balance may be paid out of the proceeds of the sale of real estate, to the exclusion of claims of creditors of the seventh class.

ERROR to the Circuit Court of Crawford county.

Messrs. CALLAHAN, JONES & MAXWELL, for plaintiff in error;

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that the award should be paid in full to the exclusion of general creditors, cited Rev. Stat. 1877, 112, § 74; Rev. Stat. Chap. 3, § 70.

Messrs. PARKER & OLWIN, for defendant in error; that the widow may take the whole of the personal property, but as to the balance of her award, is on a footing with other creditors, cited Gross' Stat. 1869, 806, § 52; Cruce, Adm'r, v. Cruce et al. 21 Ill. 46; Miller v. Miller, 82 Ill. 463.

TANNER, P. J. Robert A. Beattie died intestate at Crawford county, in March, 1876, leaving a widow and child. Letters of administration were granted to the plaintiff in error. The appraisement bill filed by him in the County Court fixes the value of the personal property left by the intestate at \$391.90, and the widow's award at \$642. The widow selected a part of the property at its appraised value, amounting to \$128, and elected to take the balance of the award in money. The remainder of the personal property was sold, and brought \$350. The intestate died seized of real estate, and the same was sold by the plaintiff in error under an order of the County Court, but the proceeds of the sale fell far short of liquidating the demands against the estate. The plaintiff in error filed a report of his proceedings as administrator, showing that he had paid in full the widow's award.

The defendant in error, who was a creditor of the seventh class, objected to the confirmation of the report, upon the ground that where the widow's award is not discharged from the personal estate, she cannot be preferred in the distribution of the proceeds arising from the sale of the real estate. The County Court sustained the objection, and ordered that the plaintiff in error be charged with \$164 erroneously paid to the widow on her award. From this order and judgment an appeal was taken to the Circuit Court, where the judgment of the County Court was affirmed. The plaintiff in error brings the case to this court, and assigns for error: the judgment of the Circuit Court affirming the order and judgment of the County Court.

This case presents but a single question, which must be

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determined from the statutes in force at the time, in reference to the settlement of the estates of deceased persons.

The Supreme Court, in *Cruce, adm'r, v. Cruce et al.* 21 Ill. 46, held that where the personal estate was insufficient to discharge the widow's award, and a resort was had to the sale of real estate to liquidate the outstanding indebtedness, the widow was placed upon the footing of other creditors, and her demand controlled by the statutory classifications—that she became, under the statute, a fourth-class creditor, and in case the estate should be insolvent, she had to share in the distribution of the proceeds of the sale of real estate *pro rata*.

However sound or unsound this construction of the statute may have been, it was not in accord with public opinion at that time, and the General Assembly, at the first session thereafter, hastened to relieve widows in the future, in such cases, from the effect of this construction of the statute by the passage of an act entitled "An act to amend chapter 109 of Revised Statutes, entitled Wills, in force March, 1869, which declared that the widow of a deceased person shall be entitled to receive what is known as the widow's award, whether her husband die testate or intestate, and the same shall be considered and classed as number one preferred." This act remained in force until 1872, when the laws in relation to the settlement of estates underwent a thorough revision, and the widow's award was subordinated to the payment of funeral expenses only. The seventy-fourth section of an act in regard to the administration of estates, in force July 1st, 1872, provides that "the widow residing in this State, of a deceased husband, whose estate is administered on in this State, whether her husband died testate or intestate, shall, in all cases, in exclusion of debts, claims, charges, legacies and bequests, except funeral expenses, be allowed as her sole and exclusive property forever," the following certain articles of personal property: and after specifying the several items, proceeds: "which shall be known as the widow's award, or the widow may, if she elect, take and receive in lieu of the foregoing, the same personal property or money in place thereof as is or may be exempt from execution or attachment against the head of a family residing with the

same. Section 75 provides that "the appraisers shall make out and certify to the County Court an estimate of the value of each of the several items of property allowed to the widow, and it shall be lawful for the widow to elect whether she will take the specified articles set apart to her, or take the amount thereof out of other personal property at the appraised value thereof, or whether she will take the amount thereof in money, or she may take a part in property and a part in money, as she may prefer."

"When there is not property of the estate of the kinds mentioned in the preceding section, the appraisers may award the widow a gross sum in lieu thereof, except for family pictures, jewels and ornaments."

The 109th section of the act provides: "When real estate is sold, the moneys arising from such sale shall be received by the executor or administrator applying for the order to sell, and shall be assets in his hands for the payment of the debts, and shall be applied in the same manner as assets arising from the sale of personal property." The seventieth section provides that "all demands against the estate of any testator or intestate shall be divided into classes in manner following, to wit:

"First—Funeral expenses."

"Second—The widow's award, if there is a widow," and proceeding with the enumeration until the demands are divided into seven classes. Section seventy-one provides that "all claims against estates, when allowed by the County Court, shall be classed and paid by the executor or administrator in the manner provided in this act, commencing with the first class; and when the estate is insufficient to pay the whole of the demands, the demands in any one class shall be paid *pro rata*, whether the same be due by judgment, writing, obligatory or otherwise, except as otherwise provided." The foregoing provisions of the statute of 1872 are not materially different from the laws that were in force for the settlement of the estates of deceased persons at the time, of the decision in the case of *Cruce, adm'r, v. Cruce et al.*, except as to the classification of demands in their order of payment. The statutes in force at each period cast upon the widow, to the exclusion of the claims

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of creditors, certain articles of personal property, with the privilege of taking in lieu thereof other property at its appraised value in whole or in part, or their value in money. But the statute in force at the time of the aforementioned decision made no specific provision for discharging the widow's award where it was not done from the personal estate. Hence, the court held that she would have to take her place among the general creditors provided for in the 4th class, and in case of the insolvency of the estate, she could only share *pro rata* in the distribution of the proceeds arising from the sale of real estate. In the case at bar, the plaintiff in error proceeded under a statute that arranged the demands against estates in their order of payment into seven classes, and fixed the widow's award for the second class. We think there can be no question but that when the widow elects to take the amount of the appraised value of her award in money, that she has a demand against the estate, and it is not less so when it becomes necessary to resort to the sale of real estate for its discharge.

The only theory upon which we can reach the conclusion that the widow stands on the same footing, under the statutes in force July 1st, 1872, that she did at the time of the rulings of the court in *Cruce, adm'r, v. Cruce et al.*, is to assume that where the widow's award is not satisfied out of the specific property, or other property taken in lieu thereof, or by money derived from the personal assets, that her demand then loses the character of the widow's award, as contemplated by such statute, and is, therefore, not embraced in the specific classification of demands against an estate, made for her in the 70th section of said act. An analysis of this theory, however, readily shows that in case there are no personal assets, the proceeds of the sale of real estate, though amply sufficient, independent of funeral expenses, to pay the entire demand of the widow, may be wholly absorbed by the demands of other classified creditors, or mostly so in a *pro rata* distribution among those of the seventh class, to which the defendant in error insists the law confines the widow in the case before us. We think this view is not in harmony with the spirit of liberality manifested by our legislation for many years past in reference to this and kindred subjects.

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We therefore hold that the plaintiff in error, after exhausting the personal estate in paying the balance due the widow out of the proceeds of the sale of real estate, to the exclusion of the demand of the defendant in error, acted in obedience to the command of the law.

And for the error in the Circuit Court in holding otherwise, its judgment is reversed and the cause remanded.

Reversed and remanded.

THE PEOPLE OF THE STATE OF ILLINOIS

v.

BIGGERS McFARLAND.

WRIT OF ERROR.—A writ of error will not lie except to a final order of court. There must be a final disposition of the case as to all the parties. A cause of action cannot be reviewed as to one party at one time, and as to another party at another time.

ERROR to the Circuit Court of Hardin county; the Hon. JOHN DOUGHEETY, Judge, presiding.

Mr. L. F. PLATER, for plaintiff in error; that to discharge the surety a surrender of the principal must be made before default, cited Rev. Stat. 1874, 397, §§ 304, 397.

Prior to the statute of 1874, sureties might surrender principal before judgment upon *scire facias*: Weese v. The People, 19 Ill. 643; Gross' Stat. 1869, 206, § 196; Rev. Stat. 1845, 187, § 196.

This has been changed by the present law: Wray v. The People, 70 Ill. 664.

Judgment being entered by default on the recognizance, the liability of the surety is fixed: Stevens v. Hay, 61 Ill. 399.

The common law gave courts no power to relieve against a forfeiture of recognizance: Weese v. The People, 19 Ill. 643; Pate v. The People, 15 Ill. 223; 1 Chitty's Crim. Law, 92.

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Mr. W. S. MORRIS, for defendant in error; as to the object of the recognizance, cited Underwood's Stat. 1878, 464, §297.

Sureties are released by conviction and imprisonment of the principal: *Gingrich v. The People*, 34 Ill. 448.

A cause cannot be reviewed as to one party at one time, and as to another party at another time: *Thompson v. Follansbee*, 55 Ill. 427.

TANNER, P. J. This was a proceeding by *scire facias* upon a forfeited recognizance. On the 1st day of November, A. D. 1876, the defendant in error entered into a recognizance with one Alexander Wilson for the appearance of the latter to answer to a criminal charge. The recognizance was, on the 22d day of October, A. D. 1877, forfeited, and a *scire facias* ordered by the court, and duly issued and returned to April term of Hardin Circuit Court, A. D. 1878, served upon defendant in error, and returned not found as to the principal, who filed plea, by leave of court, setting up the surrender of Wilson in open court on the 10th day of April, A. D. 1878. Plaintiff in error demurred to said plea, but admitted that Wilson was in court, but not properly surrendered, nor the plea a proper defense to the action at that late hour. Court below decided to the contrary. Pending the demurrer to the plea, the defendant in error confessed the action as to costs, and the court of its own motion gave judgment against defendant in error (the surety) for costs only, awarded execution therefor, and discharged him from the liability of the penalty of the recognizance. The court then continued the cause as to Wilson, the principal. To reverse said judgment the cause and record is brought to this court.

Many errors are assigned upon the record, but we are precluded from considering any of them for the reason that the cause is still pending in the Circuit Court as to Alexander Wilson, one of the cognizors.

The plaintiff in error insists that this point is not well made by the defendant in error, and in support of this view cites *Passfield v. The People*, 3 Gilm. 406; *Sans v. The People*, 3 Gilm. 327; *Mussulman v. The People*, 15 Ill. 51.

We have carefully considered these authorities, and find that

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they do not sustain the plaintiff in error. They are to the effect that one of several cognizors cannot complain that the case is not disposed as to all. The recognizance being joint and several, judgment may be rendered against one or more of the sureties without all being in court. In the case before us, the principal and surety were both in court, and judgment was rendered against the surety for costs, and the cause continued as to the principal. Upon this state of the record the plaintiff in error brings the case to this court on writ of error.

This course, we think, is not sustained either by principle or authority.

“A writ of error will not lie except to a final order of court, so if a bill is dismissed as to one or more of the parties, the complainant cannot prosecute a writ of error until there has been a final disposition of the case as to all other parties. A cause of action cannot be reviewed as to one party at one time, and as to another party at another time.” *Thompson v. Follansbee et al.* 55 Ill. 427; *Freeman on Judgments*, § 28, and authorities there cited. There are some exceptions to this rule, but the case at bar does not fall within them.

It appearing that this case is still pending in the Circuit Court as to one of the defendants, the writ of error is therefore dismissed.

Writ dismissed.

FIRST NATIONAL BANK OF OLNEY

v.

WILLIAM BEAIRD.

NEGOTIABLE INSTRUMENT—BONA FIDE PURCHASER—A creditor who receives from his debtor the bill or note of a third party, either in payment or as collateral security for his debt, is entitled to the same protection as a *bona fide* holder for value, and he takes it free from all equities which might have been pleaded between the original parties.

APPEAL from the Circuit Court of Richland county; the Hon. JOHN H. HALLEY, Judge, presiding.

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First Nat. Bank of Olney v. Beaird.

Messrs. CANBY & EKEY, for appellant; that the legal title to the notes was never in Beaird, and could not be transferred by a separate instrument, cited *Ryan v. May*, 14 Ill. 49; *Fortier v. Darst* 31 Ill. 212.

None but the legal owner can maintain trover for a chose in action: *Webster v. Heylman*, 11 Mo. 428.

Mr. B. B. SMITH and Mr. F. D. PRESTON, for appellee; that the contract of bailment may give rise to a claim for a tort or wrong, cited 1 *Hilliard on Torts*, 26; *Grant v. King*, 14 Vt. 367; *Lovejoy v. Jones*, 10 *Foster*, 164; *Whittock v. Heard*, 13 Ala. 776.

Trover will lie for a note in the hands of a third person: *Ford v. Cruikshanks*, 3 *Johns*. 432; *Bissell v. Drake*, 18 *Johns*. 66.

ALLEN, J. This was an action of trover brought by appellee against appellant for the recovery of the value of certain promissory notes claimed by appellee, which he charged appellant with converting to its own use. A jury was waived and the evidence heard by the judge, and a judgment for appellee for \$2060 and costs. From that judgment an appeal was taken to this court. The evidence shows that in a settlement between appellee and one Henry Marshall, made about May, 1877, Marshall indorsed these notes over to appellant in part payment of a debt or claim appellee held on him. There were four notes signed by S. Cahill, dated January 19, 1877, aggregating \$660, and five notes by J. N. Connour, amounting, in the aggregate, to \$785, and five notes given by J. N. Connour for \$100 each, all payable to Henry Marshall, all bearing eight per cent. interest, and all given for lands sold by Henry Marshall to the payees. The notes ran from one to five years from date. To some of the lands deeds were executed by Marshall and handed over with the notes to appellee, to be delivered when notes were paid. In March 5, 1878, notice was served on appellant by appellee that appellee claimed certain of the notes above described, and some others described in the notice, and in the plaintiff's declaration. On the trial appellee testified that he and Marshall had

a land trade, and that Marshall had given him the notes described in the declaration in consideration of one-half of a farm in Richland county, and a tract of land in Florida; that no title passed at the time, but that afterward he deeded the Florida tract to appellant under the direction of Marshall; that after land trade he and Marshall got Cahill to change notes and make them payable to himself instead of Marshall; that Marshall was cashier of appellant at the time; he, appellee, never had the notes in his possession; left them with Marshall to collect and pay over to appellee. Notes were not assigned to appellee. S. Cahill testifies that at Marshall's request he changed his original notes for the land and made them payable to appellee, and that about a year ago Windsor brought notes to him and had him take up his notes payable to appellee, and execute others payable to Marshall again; that he never had anything to do with the bank (appellant); dealt with Marshall individually. J. N. Connour bought land of Marshall; made notes payable to Marshall; Marshall afterward wanted to change them and make them payable to Beaird; he, witness, refused to do so; afterward found his note in hands of appellant; appellant gave him deed for land that Marshall made him. Never had any other dealing with the bank.

J. N. Connour testifies: Bought land of Henry Marshall, gave him my notes last year; paid these notes to Henry Spring and he gave me deed.

S. B. Winsor testified: Last spring Marshall got me to go to Cahill and give him deed and take a mortgage on land, and take new notes payable to Marshall; Marshall said the notes belonged to him then, and he wanted to turn them over to the bank.

Henry Spring testified that he was a director in bank; Marshall delivered the Cahill and Connour notes to him for the bank; notes were indorsed to bank when delivered; were delivered in May, 1877; indorsement was in Marshall's handwriting; was familiar with it; knew nothing of trade between Marshall and Beaird; Marshall kept some private papers in the bank—perhaps some in safe; notes were turned over by Marshall to bank directors in discharge of his liability to bank on settlement.

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Wm. Newell testified: Have been a director and vice-president of the bank for several years; knew nothing of the trades between Marshall and Beaird; the bank had nothing to do with them; could not have unless the matter had been brought before the directors; the notes in question were never entered on books of bank for collection; the notes were turned over to bank by Marshall in part discharge of his liability to bank after the bank trouble. Marshall had been cashier of bank, but had been discharged last spring.

It is apparent from the testimony of appellee that these notes were never transferred by Marshall to him; that they were left in the control of Marshall. They were negotiable paper, and when they passed into the hands of innocent purchasers for a valuable consideration, the assignees would be protected from any claim appellees might have to them, or to the value of them, as against the holder. There is nothing in all this evidence to take this case out of the well-established rule that protects a *bona fide* assignee of commercial paper. Appellee, in his argument, insists that appellant ought not to be regarded as a "*bona fide*" holder for value, because the notes were received by appellant for a debt or defalcation of Marshall as cashier of the bank, but an examination of authorities will dissipate this idea. Daniel on Negotiable Instruments, page 145, expresses the doctrine very happily when he says: "The best considered, as well as the most numerous, authorities regard the creditor who receives the bill or note of a third party from his debtor, either in payment of or as collateral security for his debt, as entitled to the full protection of a *bona fide* holder for value, free from all equities which might have been pleaded between the original parties;" and the same doctrine again on page 586, § 780.

This doctrine we regard as conclusive of this case, as it is presented by this record. No notice of any claim upon these notes by appellee is brought home to appellant before, at the time of transfer of the notes to it, or for ten months afterward. The evidence does not tend to show that Marshall held these notes as cashier of appellee. They were not upon the books of appellee for collection. Indeed, it would be much out

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of the usual course of business for a bank to receive and keep for collection at their risk notes of this character, a majority of which had several years to run before they matured. And while it may be a hardship on appellee to lose the notes, yet he, like all others, must be subjected to the well-settled rule of law, "that when one of two innocent parties must suffer loss, the loss must fall upon the one first in fault."

He lost his notes by leaving them with Marshall without indorsement or any writing or entry by which their ownership could be determined. He left it in Marshall's power to deceive others as to his ownership. The bank accepted them in satisfaction of a debt due it, and is protected just as others are protected who receive commercial paper. There are some other questions raised in the argument of counsel, but we shall not stop to consider them. We believe under the evidence in this case the verdict should have been for the defendant.

Reversed and remanded.

CHRISTIAN KNEBELCAMP

v.

JOHN SMITH ET AL.

1. **DEFAULT—DEFENDANT MAY INTRODUCE PROOF IN REDUCTION OF DAMAGES.**—Though a default has been taken against a defendant, he has the right to appear and introduce evidence tending to reduce the amount claimed by the plaintiff.

2. **PROMISSORY NOTE—PAYMENT MADE BEFORE ASSIGNMENT—INSTRUCTION.**—In a suit upon a promissory note, the defendant offered to show payments made to the payee before assignment. Upon this point the court instructed the jury: "That unless the defendant has shown in this case that he made any payments to the plaintiffs in this suit, the jury will find for the plaintiffs the amount proven to be due upon the note." *Held*, that one of the questions before the jury being whether any payments had been made to the payees, of which the assignees had notice, the instruction was erroneous, as foreclosing a legitimate inquiry by the jury.

APPEAL from the Circuit Court of St. Clair county; the Hon. AMOS WATTS, Judge, presiding.

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Mr. WILLIAM WINKELMAN, for appellant; that the loss of the note was not sufficiently proved, cited *Rogers v. Miller et al.* 4 Scam. 333; 1 Greenleaf's Ev. 600, § 558; *Mariner v. Saunders*, 5 Gilm. 113; *McCart v. Wakefield*, 72 Ill. 101; *Meek v. Spencer*, 8 Ind. 116.

Upon the right of the defendant to contest the assessment of damages on default: *Brigg et al. v. Snigham et al.* 45 Ind. 15; *C. & St. L. R. R. Co. v. Holbrook*, 72 Ill. 419; *David v. Bradley*, 79 Ill. 316; *Cook v. Skelton*, 20 Ill. 107; *Saylor v. Daniels*, 37 Ill. 331.

Messrs. G. & G. A. KOERNER, for appellees; that it is doubtful whether, on default, the damages may be assessed by a jury, cited Stat. 1868, 509, §§ 20, 21.

ALLEN, J. This suit was brought by appellees against appellant in the St. Clair Circuit Court, to the January term, 1877, on a promissory note executed by appellant to Wm. Wehmeyer and Frederick L. Breitenburger and indorsed to appellees. The note bore date June 26, 1874, and was for the sum of \$1,500 and bore interest at the rate of eight per cent. per annum.

The declaration avers the loss of the note by appellees after it had become due. At the said January term, 1874, a default was taken against appellant, and leave was given to plaintiff to amend his declaration. Appellant states in his brief that an amendment was made to the declaration after default against appellant, and a plea of the general issue was filed by appellant. If an amendment was made, then appellant would have a right to plead, but the record fails to show that an amendment was made after default, and in the absence of any proof on this point the court must presume that no amendment was made.

Upon the default a writ of inquiry was awarded and the cause continued.

At the September term following a jury was sworn to assess the damages of appellant, and upon hearing the evidence awarded appellee the sum of \$1,897.25. Appellant appeared before the jury and offered evidence tending to show payments made on the note before it was transferred to appellees. Appel-

lees proved execution of the note, the amount, its transfer to appellees, and its subsequent loss. Appellant was sworn as a witness, and was asked by counsel for appellant "whether any payments were made by him on the note while the payees were the legal holder of the note, and if so, how much, and whether such payments if made were indorsed upon the note."

To an answer to this question a general objection was made, which was sustained by the court and the witness was not permitted to answer.

Theodore Breitenburger, a payee of the note, was introduced as a witness for appellant, and was asked to state if any payments were indorsed upon the note before it was transferred to appellees. This was also objected to by appellees, and the witness was not permitted to answer. The appellant, though a default had been taken against him, had a right to appear and introduce evidence tending to show that payments had been made upon the note before its transfer by payees to appellees, and to show that such payments were indorsed on the note before its transfer to appellees.

It is manifest from these questions, as well as other portions of the record, that one of the defenses against a recovery for the full amount of the note and interest was that some portion of the note had been paid to one or both payees of the note, before its transfer to appellees, which was indorsed upon the note, and that evidence tending to prove such payments was sought to be introduced by appellant.

In order to make such payments available to appellant, he must show that appellees had notice of them.

To prove that they were so indorsed was necessary, inasmuch as the note was lost, and in our judgment it was error to exclude this evidence from the jury.

Appellees insist that this error will not avail appellant, inasmuch as they withdrew the objection afterward, and permitted Breitenburger to testify as to payments made him, but the evidence of appellant on this point might have been important as corroborative of Breitenburger, or as to some independent fact or circumstance tending to show payment and indorsement.

But, in addition to the exclusion of testimony of appellant

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upon this question, the court instructed the jury "that unless the defendant has shown in this case that he made any payments to the plaintiffs in this suit, the jury will find for the plaintiffs the amount proven to be due on the note in question, if they believe that the amount was proven;" one of the questions before the jury being whether any payments had been made on the note to Breitenburger, one of the payees, or to the payees jointly, of which appellees had notice. The jury might, and probably did understand from this instruction that they could not consider any such payment or the evidence tending to prove such payment in abatement of appellees' damages, although appellees might have had notice thereof.

We hold that it was error to give this instruction; that it foreclosed a legitimate inquiry of the jury in determining the amount appellees were entitled to recover.

Several other errors are assigned by appellant, but inasmuch as the judgment of the Circuit Court must be reversed for the reasons above, we do not care to comment upon the other questions raised.

Judgment reversed and cause remanded.

Reversed and remanded.

LUKE F. WILSON ET AL.

v.

JOHN ISOM.

PLEADING—DECLARATION ON BOND.—The condition of the bond was to pay such damages as should be awarded against the First National Bank for wrongfully suing out attachment, etc., and the declaration failing to aver that any damages had been awarded against the bank, it was defective, and the demurrer should have been sustained.

APPEAL from the Circuit Court of Clay county; the Hon. JOHN C. HALLEY, Judge, presiding.

Mr. RUFUS COPE, for appellants; contending that suit may

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be maintained on an attachment bond without a previous judgment against the plaintiff in the attachment, cited *Churchill v. Abraham*, 22 Ill. 455.

Previous award of damages should be averred in a suit on the bond: *Smith v. Eakin*, 2 Sneed, 456; *Payne v. Able*, 7 Bush, 344.

Mr. WM. B. COOPER and Mr. BEN. HAGLE, for appellee; cited Rev. Stat. 1874, 153, § 2; *Churchill v. Abraham*, 22 Ill. 455.

ALLEN, J. This was a suit commenced by appellee against appellants, Luke F. Wilson, Tremont Frazer and Rufus Cope.

Declaration on attachment bond set out a bond signed by appellants alone, conditioned that, whereas said Luke F. Wilson had, on the day aforesaid, prayed an attachment out of said court at the suit of the First National Bank, Flora, Illinois, against the estate of said Isom for ——— if the said National Bank should prosecute its said suit with effect; or in case of failure therein, should pay said Isom such damages as should be awarded against said First National Bank, in any suit or suits which might thereafter be brought for wrongfully suing out said attachment bond to be void; the issuing of the writ, etc., etc. By way of breach, declaration sets out that Isom was compelled to pay out attorney's fees, and was hindered and delayed in his business.

At the October term, 1877, a demurrer was filed to the declaration, which was overruled by the court. The appellants excepted, and the court, at the following term, assessed the damages against appellants, and gave plaintiff a judgment for \$165 and costs. Appellants except and pray appeal, etc.

The only question we have to consider is as to the sufficiency of the declaration. The condition of the bond bound appellants "to pay to appellee such damages as should be awarded against the First National Bank in any suit or suits which might thereafter be brought for wrongfully suing out said attachment."

The declaration fails to aver that any damages had been

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awarded against the First National Bank, and inasmuch as the undertaking was to pay only such damages as might be awarded against the bank, the declaration should have contained such averments as were necessary to fix the liability of appellants.

If the bank was one of the obligors, and was a defendant in this suit, then appellants could be held for such award of damages as might be made against the bank in this suit, and this is the extent to which the authority cited by appellee goes. *Churchill v. Abraham*, 22 Ill. 455; *Smith v. Eaken*, 2 Sneed, 456. We believe the demurrer to the declaration should have been sustained, and for this reason the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

THE CAIRO AND ST. LOUIS RAILROAD COMPANY

v.

GUSTAVUS KOERNER ET AL.

ATTORNEY—ABANDONMENT OF CASE.—When an attorney accepts employment in a case, in the absence of a special contract to the contrary, the law implies an obligation on his part to attend to it until it is determined, and he cannot abandon it without just cause. He may demand payment of fees already earned, and if not paid, may upon reasonable notice withdraw from the case; but a refusal to pay some other demand will not justify him in leaving the case.

ERROR to the Circuit Court of St. Clair county; the Hon. WM. H. SNYDER, Judge, presiding.

Messrs. JUDD & WHITEHOUSE, for plaintiff in error; that the admissions of an officer of a corporation, made in the exercise of his duties, and concerning a matter within the scope of his authority only, are admissible against the corporation, cited *C. B. & Q. R. R. Co. v. Coleman et al.* 18 Ill. 297.

An instruction assuming that certain material facts in

dispute have been proved, is erroneous: *Duffield v. Delancy*, 36 Ill. 258; *Farnan v. Childs*, 66 Ill. 544; *Cusick v. Campbell*, 68 Ill. 508; *Chicago v. Scholten*, 75 Ill. 468.

Mr. L. D. TURNER, for defendants in error; that where a client stands by and permits professional work to be done by an attorney under the direction of his attorney, he assents thereto by his silence and acquiescence, cited *Eggleston et al. v. Boardman*, *The Reporter*, June, 1878, 724.

ALLEN, J. The record in this case shows that defendants in error commenced an action of assumpsit against plaintiff in error in the St. Clair Circuit Court, returnable at the April term, 1876. In their declaration filed in the case, they ask a recovery for legal services in the sum of \$2,500. There is no itemized account filed with the declaration, or in the case; but simply an account for legal services, \$2,500. A trial was had under this declaration, and a plea of the general issue before a jury, resulting in a verdict for defendants in error of \$1,675.

The defendants in error claim fees for legal services in *Chestnutwood v. Plaintiff in error*, and for services in County Court, \$1,000, on which they admit a payment of \$750; also for services in Waterloo township, \$1,000, and in Holbrook survey case, \$125; also in case of *People ex rel. Cairo & St. Louis Railroad Co. v. Depegt et al.*, \$100; to making application for re-hearing in *Cairo & St. Louis Railroad Co. v. Holbrook*, \$25, and also to legal services in injunction case of Holbrook, then pending and undetermined in the City Court of Alton, \$500. Over this last item the principal controversy arises.

The court permitted the defendants in error to introduce evidence of the value of their services in this case while the cause was still pending and undetermined. Plaintiff in error objected to the evidence, on the ground that the relation of attorney and client still existed; that no reasonable notice of a withdrawal from the case had been given to plaintiff in error, and no bill for this service had been rendered by defendants.

Whether this evidence was proper on this trial must be

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dependent upon the facts and circumstances developed in its progress. The witness, G. A. Koerner, states the employment: says that they had not given defendant notice that such employment would not be continued; had never made or presented any bill for such services, or demanded the same, but that he told Searls, the attorney of the company, "just before this trial began, that if the defendant would not pay us our demands for the old cases, that we would withdraw from this case at Alton, and put in our bill for it."

G. Koerner says in his evidence: "This forenoon I told Mr. Searls that unless our full amount was paid, or if we had to go on with the suit to get our pay, that we would withdraw from the Holbrook injunction case, and put our charges for that case into this suit." "I told Searls, when he filed his plea, that after what had passed between the company and him, and between us, I considered the idea of defending the case as very strange, and to urge us into a trial as an offense and insult to us, intimating very strongly that if he did not withdraw the plea we would have no more to do with the company, and claim for all our services." "We never made any bill to the defendant for such services, or asked defendant for any pay upon that account, and gave defendant no notice of our intention to withdraw from the suit, until the conversation above alluded to with Mr. Searls. We felt justified in doing so, because the defendant would not pay our bill in the other cases, and thus compelled us to go into this trial, which is unpleasant to us."

It is manifest from this evidence that the purpose to set up a claim for services in this suit did not exist when this suit was brought, but that it arose from causes occurring during the progress of the suit. We understand that when an attorney takes an employment in a case, unless there is some special contract to the contrary, the law implies an obligation to attend to it until it is determined; that he cannot abandon it without just cause; that he may demand the payment of fees already earned, and that if not paid upon reasonable notice he may withdraw from the case. 2 Greenl. Ev. § 142.

In this case no notice was given until during the progress of

the trial in court. No bill had been rendered, no demand of fees for this service, but if notice had been given, the reason assigned for withdrawing is not such as is recognized by the law. The same authority referred to above holds that a refusal to pay some other demand or liability will not justify an attorney in withdrawing from the case. So that in either view of the case it was error to admit the evidence to go to the jury. It is insisted by counsel for defendant that the evidence, independent of that in relation to the Holbrook injunction case, authorized the jury to find the verdict for \$1,675, and that the jury must have left out of view the \$500 charge in that case, else their finding would have been for a larger sum.

If there had been no conflict in the testimony as to the value of the other services rendered we might with some degree of certainty arrive at that conclusion, but as there was no special finding by the jury on that question, and as there was conflicting testimony as to the value of the other services, we do not feel authorized to conclude that the jury did not consider this \$500 charge as well as others.

Again, the court permitted plaintiff in error to ask Buckston, a witness, whether the facts in proof would justify defendants in withdrawing from the Holbrook case, and (over the objection of defendants) the court permitted the witness to answer that "in his opinion they would." Now, whether they would or not justify a withdrawal was a question of law, and the opinion of the witness ought to have been excluded from the jury.

For these reasons the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

Ferriman v. Fields et al.

CHARLES FERRIMAN

v.

JEHU FIELDS ET AL.

1. TRESPASS—WHO ARE LIABLE.—All persons who order, direct, aid, abet or assist in the commission of a trespass, are liable for all damages, though not benefited by the act.

2. RATIFICATION.—An attorney who instructs a constable as to the manner of making a levy, and afterwards with full knowledge of the premises, receives the proceeds of the sale under such levy, ratifies and adopts the acts of the constable so as to make him a trespasser *ab initio* even if he was not a trespasser in the first instance.

APPEAL from the Circuit Court of Clay county; the Hon. JOHN H. HALLEY, Judge, presiding.

Messrs. WILSON & HUTCHINSON and C. & B. B. SMITH, for appellant; that when a sheriff makes himself a trespasser in the execution of a writ, all who direct, request, aid or abet, are joint trespassers with him, cited Wolf v. Boettcher, 64 Ill. 316.

Mr. JEHU FIELDS, for appellees.

BAKER, J. Schlanker & Co. made a general assignment to Ferriman for the benefit of their creditors, and the assignee took possession of the property. A week afterward Fields, as attorney for Henderson & Co. sued Schlanker & Co. and recovered a judgment against them. Nearly a month after the assignee had taken possession under the assignment, Fields sued out an execution and delivered it to Gilbert, a constable and co-defendant herein, with directions as to levying it. Gilbert broke open the store and seized, removed and sold goods worth \$331 to satisfy the execution. The only controversy is as to whether Fields was a joint trespasser with Gilbert.

All persons who order, direct, aid, abet or assist the commission of a trespass or the conversion of personal property, are liable for all the damages, though not benefited by the act. A

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person may be guilty of the trespass, although he does not assent to the act until after it was committed. If a person sue out execution and give a bond of indemnity to the sheriff or constable to induce him to sell the goods of another, this is a sufficient interference to make him liable; so if he be in company with the officer at the time of the execution; and so, also, if he adopt the officer's acts by receiving the goods or money. 1 Chit. Pl. 79, 80; Wolf v. Boettcher, 64 Ill. 316.

To our minds the clear weight of the evidence in this case shows that the constable in committing the trespass, was acting under the instructions of Fields; but, at all events, Fields ratified and adopted the acts of the constable. With full knowledge of the premises he took the proceeds of the sale from the constable, and refused to let the constable pay them to appellant. By this action he became a trespasser *ab initio* even if he was not a trespasser in the first instance. The court therefore erred in overruling the motion of appellant for a new trial. Inasmuch as some of the instructions given for the defendant Fields contravene the principles of law above enunciated, they are erroneous, and they probably misled the jury.

For the reasons stated the judgment is reversed and the cause remanded.

Reversed and remanded.

BERNARD FLYNN

v.

LAVINA GARDNER.

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1. EVIDENCE—USE OF MEMORANDUM.—A witness may refresh his memory by the use of a memorandum when he recollects having seen the writing before, and while the facts were fresh in his memory, though he has, at the time of testifying no independent recollection of the facts mentioned in it, yet remembers that at the time he saw it he knew the contents to be correct.

2. HUSBAND AND WIFE—TESTIMONY BY.—The statute allowing husband and wife to testify for each other in certain cases, is in derogation of the common law, and parties cannot avail themselves of its privileges unless they come within its provisions.

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3. KEEPING BOARDING-HOUSE—SEPARATE PROPERTY OF WIFE.—Under some circumstances, the business of keeping a hotel or boarding-house may perhaps be regarded as the separate property of the wife; but the fact that she makes the contracts for board, and receives the pay therefor, is not sufficient to prove a separate property. The presumption would be, where the husband and wife live together, that the husband is the head of the family, that the expenses were borne by him, and that he received the profits derived from the boarders, and that his wife acted merely as his agent.

APPEAL from the County Court of White county; the Hon. ORLANDO BURELL, Judge, presiding.

Messrs. JOHNSON & GRAHAM, for appellant; that no proper foundation for the admission of the account book as evidence was laid, cited Rev. Stat. 1874, 489, § 3.

Mr. P. A. PEARCE, for appellee; as to the admission of evidence, cited Rev. Stat. 489, § 5.

BAKER, J. Lavina Gardner, a married woman, sued Bernard Flynn for rent and for a board bill, and recovered judgment against him in the County Court of White county.

Upon the trial of the case, D. W. Gardner, the husband of appellee, against the objection of appellant, testified as a witness for appellee, for the purpose of establishing both the claim for rent and the claim for board. He was a competent witness as to the rent, for the premises rented were the separate property of the wife; but he should not have been permitted to testify as to matters proving or tending to prove, the demand for board. We are not prepared to say that the business of keeping a hotel or boarding-house may not in some cases and under some circumstances, be the separate property of the wife, but we are of opinion that this record does not show such a case. Appellee and her husband were living together as husband and wife and had a family, and appellant and his wife and bookkeeper boarded with them. It is true the evidence shows that the wife had charge of the house, and made the contract with appellant for board, and the settlement with him in regard thereto, and received from him all moneys that he paid therefor. A wife may well, should there be boarders in

the family, make the contracts and settlements with such boarders and collect the pay therefor, and yet all this would not prove any separate property in the wife. The presumption would be that the husband was the head of the family, and that the expenses of the family and of keeping the boarders were borne by him, and that he received and enjoyed, for the use of himself and family, the profits derived from the boarders, and that the wife was merely acting as his agent. The fifth section of chapter 51 of the Revised Statutes of 1874, is in derogation of the common law, and parties cannot avail themselves of its privileges unless they bring themselves within its provisions. The evidence in this record does not rebut the presumption of the law and of our common experience, and establish the fact that this boarding of appellant and his wife was the separate property of the appellee within the meaning of the statute.

The account book of appellee was introduced in evidence, over the objections of appellant. The foundation laid was not such as was required in this State before the law of 1867, which law was a relaxation of the rule. *Boyce v. Sweet*, 3 Scam. 120. Nor did appellee bring herself within the requirements of the statute. R. S. 1874, p. 289, § 5.

It is urged that the court committed error in permitting appellee, while testifying, to refer to the memorandum book that had been kept by her husband.

She testified on the trial that every time she received any money from appellant she had her husband to set it down; that she could not remember the sums of money paid her—neither the dates, nor the amounts paid, nor the number of payments made by appellant—without referring to the memorandum book; that she stood by her husband and saw him make each entry in the book, and knew them to be correct; that when appellant or his bookkeeper paid her money she went to her husband and told him to set it down.

A witness may refresh and assist his memory by the use of a memorandum or entry in a book when he recollects having seen the writing before, and while the facts were fresh in his memory, and though he has, at the time of testifying, no independent

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recollection of the facts mentioned in it, yet remembers that at the time he saw it he knew the contents to be correct. 1 Greenl. Ev. §§ 436, 437.

We are of opinion that this error is not well assigned.

It appears to us to be clear, from the evidence, that on the 1st day of May, 1877, appellant was not indebted for either board or rent, and that a full settlement was made to that date. All payments after that date were made by the clerk of appellant, and there is no discrepancy between the parties as to the amounts paid, except as to the alleged payment of \$45, and upon this point we think that the clear-weight of evidence is for appellant; otherwise we cannot reconcile with ordinary human conduct the action of appellee in returning \$25 as overpaid. She now claims that appellant was then in debt to her for board, but she made no claim for board at that time, and returned the money of her own motion, and without any request from the clerk of appellant. It is true that it was part of \$60 that had been paid as rent, but if board was then due and unpaid she naturally would have suggested its application to that purpose, instead of going to appellant's bar-room and returning it, with the statement that she had been paid too much.

It is our opinion the finding of the court was manifestly against the weight of the evidence.

The judgment is reversed and the cause remanded.

Reversed and remanded.

NOAH JOHNSTON

v.

CHARLES A. BERRY.

PRINCIPAL AND AGENT—RATIFICATION—REPUDIATION.—If a principal intends to repudiate the acts of his agent, it is his duty to do so at once on receiving knowledge of them. If, on the contrary, he neglects to do so, and by his silence and delay the party contracting with the agent is led to believe that he has consented thereto, and thereby parts with a valuable consideration, the principal will be held to an implied ratification of the agreement.

Johnston v. Berry.

APPEAL from the Circuit Court of Jefferson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. THOMAS S. CASEY, for appellant; that a principal must disaffirm the unauthorized act of his agent as soon as the fact comes to his knowledge, cited Chitty on Contracts, 202; 1 Parsons on Contracts, 82; Paley on Agency, 171; 2 Kent's Com. 615; Livermore on Principal and Agent, 396; Ward v. Williams, 26 Ill. 447; Williams v. Merritt, 23 Ill. 623; Searing v. Butler, 69 Ill. 575.

If payment of an individual debt is made out of the firm property, with the consent of the other partner, or such payment is subsequently ratified by the other partner, it will bind the firm: Corbin et al. v. McChesney, 26 Ill. 231; T. W. & W. R. R. Co. v. Rodrignes, 47 Ill. 188; Marine Co. v. Carver et al. 42 Ill. 66; Casey et al. v. Carver et al. 42 Ill. 225.

Mr. CHARLES H. PATTON, for appellee; contended that appellant received the goods knowing that the party giving them was a clerk or partner, and had no authority to pay his debt in that manner, and cited Trustees, etc. v. McCormick, 41 Ill. 323.

The burden is upon appellant to prove that appellee ratified the act: 1 Greenleaf's Ev. § 74.

ALLEN, J. This suit was commenced before a justice of the peace, and taken by appellee to the Circuit Court. Trial at February term, A. D. 1878, and judgment for appellee for \$115 and costs. The cause is brought to this court by appeal.

The facts are, substantially, as follows:

Appellee and one J. F. Baltzel were in the grocery business together in Mt. Vernon. They were brothers-in-law. Appellee furnished the capital, and Baltzel, for his services was to receive one-half the profits. Baltzel was indebted to appellant, and had given appellant two notes. He agreed with appellant to pay the notes, or part of them, out of the stock in the grocery, if appellant would credit the notes with what he got. With this agreement, appellant commenced getting groceries

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in October, 1875. Sometimes he bought of Baltzell and sometimes of appellee, until February, 1877, when his bill amounted in the aggregate to \$115. That the house was selling for cash.

Some time in February, 1877, appellee presented his account to appellant and demanded payment.

Appellant notified appellee of his arrangement with Baltzell, and refused to pay appellee the account.

What occurred subsequently will appear in the opinion.

The only question raised by this record is, whether the evidence in this case sustains the judgment of the Circuit Court.

The appellee, when told by appellant of the arrangement between appellant and Baltzell, proceeded with appellant to the store of appellee to see Baltzell. Baltzell informed appellee that what the "Major" (meaning appellant) "said was correct." Appellee replied, "I did not know it," or "You did not tell me." Appellant remained some time in the store with appellee, but nothing further was said by appellee about the matter. When appellant left the store, and from that time until August or September following, appellee—although meeting appellant almost daily—said nothing further to appellant about the bill. In about one month after the interview between the parties at the store, in the presence of Baltzell, appellant and Baltzell had a settlement, in which appellant settled the account by surrendering up to Baltzell one of his notes, and placing upon another a credit for the balance after paying off the one note; that Baltzell then entered at the foot of the account on the book, "charge to Baltzell," and from that time for five months appellant heard nothing more from appellee about the matter, when appellee again demanded payment of the account. Was the conduct of appellee at the time he was made acquainted with the facts, and afterward, such as to imply assent to the agreement made by his agent or clerk?

If appellee intended to repudiate the contract of Baltzell, it was his duty to do so at once on learning what the contract was. Chitty on Contracts, p. 202; Parsons on Contracts, 1st vol. p. 82. He had no right to deceive appellant by his silence, and induce him to surrender his notes to Baltzell under the

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impression that he, appellee, was consenting to the arrangement; and if by his silence he led appellant to believe he was assenting to it, he, by implication, ratified the agreement. *Ward v. Williams*, 26 Ill. 447; *Williams v. Merritt*, 23 Ill. 623.

Appellee says he told appellant at the time he first presented his bill that he could not pay the individual debts of Baltzell. Appellant contradicts him in this, and says that it was at the time he demanded his bill, in August or September, that he made that remark; but whether this remark was made at the one time or the other, when appellee, in his own store, was confronted by his clerk or agent, and informed that appellant had such an arrangement with him, on which he had received the goods, it was his duty then and there to have repudiated the contract of his clerk, and by his silence at that time and for six months afterward, he impliedly ratified it. With these views, we believe the judgment of the Circuit Court is not supported by the evidence.

Judgment of the Circuit Court reversed and cause remanded.
Reversed and remanded.

WILLIAM NEWELL

v.

MARY E. CLODFELTER ET AL.

PRACTICE—SETTING ASIDE ORDER—NOTICE TO OPPOSITE PARTY.—After a general order of continuance has been entered in a cause, it is error to set aside such order in the absence of the opposite party, no notice having been given him of any intended application to set aside.

APPEAL from the Circuit Court of Richland county; the Hon. JAMES C. ALLEN, Judge, presiding.

Messrs. CANBY & EKEY, for appellant; that it was error to set aside the continuance without notice to appellant, cited *McKee v. Ludwig*, 37 Ill. 28; *Mattoon v. Hinkley*, 33 Ill. 208.

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Mr. B. B. SMITH, for appellees.

BAKER, J. On the 30th day of October, 1877, a decree was entered in this cause in vacation. At the November term, 1877, of the Richland Circuit Court, a motion was filed to set aside the decree that had been so entered, and said motion was sustained, and the decree was vacated, and a re-hearing of said cause was granted.

At the April term, 1878, of said court, a general order of continuance was entered in the case. On a subsequent day of the term this order of continuance was set aside by the court in the absence of solicitors for appellant, and a final decree was rendered. No notice was given to appellant, or to his solicitors, of any intended application to set aside the order of continuance.

The appellant was entitled to a reasonable notice before the order of continuance was set aside, and a final decree upon the merits rendered against him. *McKee v. Ludwig*, 30 Ill. 28; *Mattoon v. Hinckley*, 33 Ill. 208.

For this error the decree herein must be reversed and the cause remanded for a re-hearing.

As the evidence in the record is exceedingly meagre and unsatisfactory, and as there will be a re-hearing, wherein the evidence will probably present the facts in a more tangible shape, we omit any discussion of the errors assigned that involve the merits of the controversy.

Reversed and remanded.

ALLEN, J., took no part in the decision of this case.

Gregg v. Fisher.

WILLIAM R. GREGG

v.

ULYSSES E. FISHER.

1. **PARTNERSHIP—POWER OF ONE PARTNER TO BIND THE FIRM.**—In ordinary commercial partnerships, each partner has the right to pledge the partnership property, or to borrow money and give notes for partnership purposes, in the firm name; and when credit is extended to a partnership within the scope of its business, it will bind all the partners, notwithstanding any secret arrangement they may have among themselves, unknown to those giving the credit.

2. **PARTNERSHIP NOTE—PRESUMPTION—BURDEN OF PROOF.**—A note or bill made by one partner in the name of the firm, will be presumed to have been made in the course of partnership dealings, and the burden of proof is upon him who seeks to impeach it, to show the contrary, and that such fact was within the knowledge of the payee.

3. **MISAPPLICATION OF FUNDS BY ONE PARTNER.**—A misapplication, by one partner, of the funds borrowed, constitutes no defense to suit for payment of the note, unless it be shown that the plaintiff at the time he loaned the money had knowledge that the same was to be used for other than partnership purposes.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. LEVI DAVIS, Jr., for appellant; as to the power of one partner to borrow money, etc. for partnership purposes, cited *Clery v. Ginrich*, 57 Ill. 531; *Story on Partnership*, § 102.

When credit is given to a firm within the scope of its business, all the partners will be bound, notwithstanding any secret understanding between them, which is unknown to those giving the credit: *Story on Partnership*, § 105; *U. S. Bank v. Binney*, 5 Mason, 176; *Ethridge v. Binney*, 9 Pick. 272; *Winship v. Bank of United States*, 5 Pet. 529; *Buckner v. Lee*, 8 Ga. 285; *Michigan Bank v. Eldridge*, 9 Wall. 544; *Bush v. Crawford*, 7 Bank Reg. 209.

A subsequent misapplication of the money by one partner, made without the knowledge of the lender, will not release the firm from liability: *Wagner v. Freschl*, 56 N. H. 495; *Blodgett v. Weed*, 119 Mass. 215; *Warren v. French*, 6 Allen, 317;

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Hayward v. French, 12 Gray, 453; Emerson v. Harmon, 14 Me. 271; Church v. Sparrow, 5 Wend. 223; Onondaga Co. Bank v. DePuy, 17 Wend. 47.

A note made by one partner in the firm name will be presumed to have been made in the course of partnership dealings, and the burden is upon him who alleges the contrary to show it was not: Parsons on Bills, 128; Doty v. Bates, 11 Johns. 544; Whitaker v. Brown, 16 Wend. 505; Foster v. Andrews, 2 Penn. 160; Ensminger v. Marvin, 5 Blackf. 210; Knapp v. McBride, 7 Ala. 19; Thurston v. Lloyd, 4 Md. 283; Manning v. Hays, 6 Md. 5; Hamilton v. Summers, 12 B. Mon. 11; Thicknesse v. Bromilor, 2 Cr. & J. 425; Barrett v. Swan, 16 Me. 180; Bank of U. S. v. Binney, 5 Mason, 176; Miller v. Manice, 6 Hill, 114.

Mr. CHARLES P. WISE, for appellee; that the evidence did not sufficiently establish the loss of the notes, cited *Dornandy v. State Bank*, 2 Scam. 236; *Palmer v. Logan*, 3 Scam. 56; *Rogers v. Miller*, 3 Scam. 333; *Mariner v. Saunders*, 5 Gilm. 113; *Rankin v. Crow*, 19 Ill. 626.

The case in every aspect presents questions of fact which it was the province of the jury to decide, and their verdict should not be disturbed: *Wiggins Ferry Co. v. Higgins*, 72 Ill. 517.

ALLEN, J. This was an action of assumpsit, by appellant against appellee and Cyrus Gregg, partners, under the style of Fisher & Gregg, on two promissory notes executed in the firm name of Fisher & Gregg, to the order of appellant, each dated June 17th, 1872, and payable, respectively, in twenty and twenty-five days after date; one of them being for \$275.00, and the other for \$120.00. The third count contained the ordinary money counts, and under it appellant sought to recover back \$150.00, advanced by him to defendants on a draft drawn on him in the firm name of Fisher & Gregg, and dated June 1st, 1872.

No service was had on the defendant Gregg, or appearance entered for him. Fisher appeared and filed his plea, denying that he executed the note, verified by his affidavit. He also pleaded the Statute of Limitations.

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Upon the first plea plaintiff joined issue, and to the second replied that the "cause of action accrued within five years." Evidence was introduced by plaintiff showing the loss of the notes; also showing that defendant and Cyrus Gregg, at the time the notes were executed, were in partnership in selling drugs at Alton, Ill., under the name and style "Fisher & Gregg," from June, 1871, until August, 1872. That the store was managed by Gregg alone, Fisher taking no active part in the management. The evidence further shows that Gregg borrowed money for the firm at different times, and from different firms, for which he executed the firm paper; that in the spring of 1872 he borrowed \$600 from Pearly & Woodman, gave the firm note for its payment, and that that note was afterwards taken up by defendant, and two notes executed in the firm name for it.

Benj. Sargent testifies that Fisher & Gregg borrowed money from First National Bank on two occasions, in 1871 and '72; notes each for \$300; don't remember who got the money; one of these notes was paid by Fisher's check.

The plaintiff, Wm. Gregg, testifies that he loaned the money for which notes were executed to Cyrus Gregg, for the use of the firm of Fisher & Gregg, as he, Cyrus Gregg, said that he had before that time accepted two drafts drawn by the firm of Fisher & Gregg, and paid the money on them; that Fisher had thanked him for accepting these drafts; that he did not present notes to Fisher, though he had opportunities to do so. Cyrus Gregg was in the family of Fisher, and was having trouble, and he did not want to do it.

Wm. T. Evarts testified that he was in wholesale drug business at Alton in 1871 and '72. Often sold bills to Fisher & Gregg, for which he took their firm notes; had as many as 18 or 20 of their notes at different times; notes were executed by Gregg in firm name; knows that Fisher paid one of these notes.

Cyrus Gregg testified: "Notes sued on were given by me to raise money to be used in firm, and it was so used. Often borrowed money and gave firm notes for its payment whenever it was to be used in business of the firm; never gave firm notes

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for money I owed individually; am son-in-law of defendant Fisher."

Defendant Fisher testified: "Was in partnership with Cyrus Gregg; did not allow Cyrus Gregg to borrow money or give firm notes; did pay one note in First National Bank, but did not want to do it."

Defendant then introduced cash book, or what purported to be cash book, kept by Gregg, in which certain charges and credits were entered to plaintiff, in which the money obtained on the two notes is not entered; never heard of these notes or drafts from Wm. Gregg. Cyrus Gregg's reputation for truth is bad—would not believe him under oath.

John H. Smith testified that in Spring of 1872, he loaned Cyrus Gregg, for the firm of Fisher & Gregg, \$200; when due, Gregg could n't pay it, and refused to give firm notes for it; said Fisher had forbid him to do so.

Several witnesses testified to bad character of Cyrus Gregg for the truth.

The court gave the following instructions for defendant:

If the jury believe from the evidence, that the draft sued on in this suit, was due more than five years before the commencement of this suit, then the jury, under the pleadings in this case, must find as to such draft for the defendant.

If the jury believe from the evidence in this case, that the notes claimed to be lost and sued on in this case, were made by one C. M. Gregg, who signed the firm name of Fisher & Gregg to the same; but if they further believe from the evidence, that the said notes, if actually given, were given for borrowed money, and that C. M. Gregg, as a member of said firm of Fisher & Gregg, had no power or right to give the firm note for any such purpose, then the jury, as to such notes, must find for the defendants.

Upon this evidence and these instructions, the jury returned a verdict for defendant. A motion for new trial was overruled, and judgment on verdict for defendant.

In ordinary commercial partnerships (such as this one), each partner has a right to pledge the partnership property, or to borrow money for partnership purposes, to draw, negotiate,

accept or endorse bills of exchange and promissory notes or checks in the partnership name. *Ulery v. Ginrich*, 57 Ill. 531. The rule is also well settled, that when a credit is given to a firm within the scope of its business, whether the partnership be general or limited, it will bind all the partners, notwithstanding any secret arrangement they may have among themselves, which are unknown to those who give the credit. *Story on Partnership*, § 105.

Again, a bill or note made by one partner in the name of the firm, will be presumed to have been made in the course of partnership dealings; and if the other partners seek to avoid its payment, the burden of proof will lie upon them to show that it was given in a matter not relating to the partnership business, and that that fact was within the knowledge of the payee. *Parsons on Bills*, § 128.

Now let us apply these principles to the evidence in this case: It is shown by the evidence that Fisher & Gregg were partners in a drug establishment; that Gregg conducted the business; that he made the purchases and sales, made collections, borrowed money when necessary to carry on the business of the firm, and that so far as the public knew, was fully authorized to execute notes and draw bills and drafts in the firm name. That the partnership was to all intents and purposes, so far as the public were advised, an ordinary commercial partnership, with the rights and privileges and liabilities that attach or grow out of such a partnership. That while this firm was doing business, Gregg, the business manager, borrowed this money for the use of the firm, and executed the notes sued on. What is there in the evidence to contradict this? Fisher, defendant, admits the partnership; admits that Gregg borrowed money and executed notes in the name of the firm; admits that he paid some of the notes himself, but says that he "told Gregg that he must not borrow money, and must not use the firm name in giving notes and drawing bills, etc. Now, if, instead of contenting himself with saying this to his partner, he had informed the public and the men who were extending favors to the firm, that Gregg had no authority to borrow money and to execute notes in the firm name, he might have made his defense

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available. It is true that defendant shows by one "Smith" that Gregg told him at one time that Fisher had ordered him not to give notes in the firm name; but Smith, so far as the evidence shows, is the only man outside the firm that had any notice of this secret reservation between the partners.

Then, so far as this evidence goes, neither this plaintiff nor any other individual or firm that extended favors to this firm, had any knowledge of such a restriction on Gregg's power. Defendant paid some of the notes thus given, and although he may have paid them under protest as having been given in violation of an agreement between him and his partner, his protest seems to have been only a "mental" one, as he failed to say anything about the understanding to those who had been extending accommodation to his firm.

The evidence wholly fails to show that this plaintiff had any knowledge that such an agreement existed between the partners. Plaintiff testifies that when he loaned the money, he understood it was for the use of the firm, and in this he stands uncontradicted. He denies that he had any knowledge of an arrangement by which Gregg was not authorized to execute firm notes; in this he is uncontradicted. And although Cyrus Gregg may have misapplied the funds thus obtained, still that is no defense to a suit on the notes, unless it was shown that plaintiff had knowledge that he intended to misapply them; and the fact that Cyrus Gregg did misapply the money thus obtained, if proven, either by the cash book or in any other way, would be no defense to this action. Before the defendant could avail himself of such a defense, he must show that plaintiff had knowledge that the money was to be used for some other than a partnership purpose. Parsons on Bills, 128. And however successfully the defendant may have been in impeaching Cyrus Gregg, plaintiff's evidence upon these questions stands not only unimpeached, but uncontradicted.

In the second instruction given by the court to the jury for defendant, they are told "that if they believe from the evidence that Gregg signed the name of the firm of Fisher & Gregg to the notes for borrowed money, and that Gregg had no power or right to give the firm note for any such purpose, then the

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jury as to such notes must find for defendant." That instruction was, in our judgment, calculated to mislead the jury. The jury might believe that by an agreement between Fisher and Gregg, Gregg had no right to execute notes in the name of the firm, and that no recovery could be had on those notes for that reason. Yet, if the plaintiff loaned money for the purposes of the firm, and took the notes without any knowledge of the secret agreement between Fisher and Gregg, then the defendant Fisher would be liable, and the verdict should have been for the plaintiff.

With these views, the judgment of the Circuit Court must be reversed and the cause remanded.

Reversed and remanded.

TRUSTEES OF SCHOOLS

V.

MATTHEW STOKES ET AL.

1. **TOWNSHIP TREASURER—PAYMENT OF MONEY TO SUCCESSOR—ACTION IN NAME OF TRUSTEES OF SCHOOLS.**—When a township treasurer goes out of office it is his duty to pay over all moneys in his hands to his successor, and on a failure to do so, an action will lie upon his official bond therefor, at the suit of the trustees of schools, whether an apportionment of such moneys has been made among the several districts or not. If an apportionment has been made, it is not necessary that the board of trustees should sue for the use of the several districts.

2. **COSTS AGAINST TRUSTEES.**—The court erred in giving judgment for costs against the plaintiff. Courts are forbidden by statute to charge costs where any agent of any school fund suing for the recovery of the same is plaintiff, and shall be unsuccessful in such suit.

3. **TESTIMONY AS TO DISTRICT FUNDS.**—It was error to exclude from the jury evidence going to show that district funds went into the hands of the defendant as treasurer, and that he refused to pay over the same on demand, but converted them to his own use.

APPEAL from the Circuit Court of Union county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

Mr. W. S. DAY, for appellants; that the trustees were the

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proper parties to bring suit, cited *School Directors v. The People*, 79 Ill. 511; *Adams et al. v. The People*, 82 Ill. 122; *Rev. Stat. Chap. 112, § 62*.

School directors of the several districts would have no right to sue; they have only certain specified powers, and until authorized by an order of the board of trustees, have no right to receive any portion of this fund: *Glidden et al. v. Hopkins*, 47 Ill. 525; *Newell v. School Directors*, 68 Ill. 514; *Wells v. The People*, 71 Ill. 532; *Peers v. Board of Education*, 72 Ill. 508; *School Directors v. School Directors*, 73 Ill. 249; *School Directors v. Fogleman*, 76 Ill. 189; *Clark v. Directors*, 78 Ill. 474; *Wilson v. School Directors*, 81 Ill. 180; *Tappan v. The People*, 67 Ill. 340.

TANNER, P. J. This was an action of debt, instituted by the Board of Trustees of Schools, on the official bond of Matthew Stokes, as township treasurer. The cause was submitted to a jury, and a verdict returned in favor of appellees. A new trial was refused, and judgment rendered for appellees for cost.

The case is brought to this court by appeal, and various errors alleged. We propose, however, to notice only such of them as we think will properly dispose of the case.

The appellant urges that "the court erred in excluding from the jury the testimony in relation to district funds." The fourth and fifth breaches of the declaration charge that district funds to the amount of two thousand dollars, went into the hands of Stokes, as treasurer, and that he refused to pay the same over to his successor in office upon demand, but that he converted said funds to his own use. The court, in the first instance, permitted testimony to go to the jury, which showed that various sums of district money went into the hands of Stokes as such treasurer, but afterwards excluded such testimony from the consideration of the jury. We are of opinion this was error.

The next alleged error which we shall notice, is that "the court erred in giving instruction for the defendants." The instruction of which complaint is made is as follows: "The

court instructs the jury, that whenever a State or county fund, paid into the hands of a township treasurer, is apportioned and divided among the various districts of a township, then after such apportionment and division, no recovery can be had against a township treasurer for such funds under a declaration like the one in this case." This instruction should not have been given. Section 40, Chap. 122 R. S. 1874, requires that the township board shall cause all moneys for the use of townships and districts to be paid to the township treasurer, and provides that for any improper conduct in the discharge of his duty as treasurer, they may sue him upon his bond. The bond sued on in this case is in pursuance of the 55 section of the same act, and made payable to the appellants, and requires that Stokes shall deliver to his successor in office all moneys, books and papers, securities, and other property in his hands, as such township treasurer.

Section 34 provides that the trustees shall ascertain on the first Mondays of April and October of each year the amount of State, county and township funds on hand subject to distribution, and shall apportion the same, and that the funds so appropriated shall be placed on the books of the treasurer to the credit of the respective districts, and the same shall be paid out by the treasurer on the legal orders of the directors of the proper districts.

From these provisions of the statute we are unable to see why Stokes, when he went out of office, was not required to pay to his successor in office any and all moneys that he had in his hands as such township treasurer, whether such funds had been apportioned or not among the several districts of the township. The appellees have not seen proper to furnish us with any brief or argument in support of this ruling of the court, and we cannot clearly determine from the brief of the appellant upon what ground the court gave the instruction. If, however, it was upon the theory that the suit should have been brought to the use of the districts among which the funds had been apportioned, it was erroneously given in this respect. In the case of *Tappan v. The People*, 67 Ill. 340, the court held that a suit brought in the name of the people to the use of the

trustees of schools, against the collector of taxes, to recover district school taxes in his hands, was properly instituted. The point that the suit should have been brought to the use of the district was urged in that case, and is disposed of by Justice Sheldon in these words: "Neither the trustees of schools nor the township treasurer would recover the taxes for their private use. The recovery would be in trust for the several school districts wherein the taxes were levied." So, in the case at bar, moneys recovered would go into the hands of the treasurer, and be held for the benefit of the districts to which it belonged by the apportionment.

We are, therefore, clear in opinion that when a delinquent treasurer goes out of office and retains moneys which he received by virtue of his office, and refuses to pay the same to his successor in office, that a right of action is created thereby in favor of the board of trustees, and against the delinquent and his sureties upon his official bond, whether an apportionment or division of the fund has been struck or not among the various districts of the township. And when an apportionment has been made to the several districts, it is not necessary that the board should sue to the use of the districts. The money recovered would be held in trust for the districts entitled to the same, according to the apportionment.

The fourth assignment of error is, that "the court erred in giving judgment against plaintiffs for cost." We also think this was error. The 78 Sec. Chap. 122, R. S. 1874, provides that "no justice of the peace, probate justice, constable, clerk of any court, or sheriff, shall charge any costs, in any suit where any agent of any school fund suing for the recovery of the same, or any interest due thereon, is plaintiff, and shall be unsuccessful in such suit."

This statute has been construed by the Supreme Court of our State in a case similar to the one at bar, adversely to the ruling of the Circuit Court. *Trustees of Schools, etc. v. Walters et al.* 12 Ill. 154; *Trustees of Schools v. Hill et al.* 85 Ill. 409. We deem a further examination of the errors assigned unnecessary, as they, even if well made, would not require any directions to be given to the Circuit Court on another trial of the cause.

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For the several errors indicated, the cause must be reversed and remanded.

Reversed.

JAMES C. WAUGH
v.
JAMES SUTER ET AL.

1. **MOTION IN ARREST OF JUDGMENT.**—Where there is a good count in the declaration to support the judgment, a motion in arrest cannot prevail. So where the declaration contained special counts on a bill of exchange, and also the common counts, on a motion in arrest of judgment on the ground that the bill of exchange showed upon its face that it was the obligation of a corporation and not that of the defendants individually, the common counts would support a judgment against defendants.

2. **JUDGMENT MUST BE AGAINST ALL.**—**PRACTICE ON DEFAULT.**—Where an action was against two jointly, one defendant answering and the other suffering default, the issue as to the defendant who pleaded should have been tried, and the same jury should have assessed the damages against both; and it was error to render final judgment against the defendant in default, and take no proceedings against the other. The defendant in default has a substantial interest in having the judgment joint as to himself and co-defendant, as it might be immediately enforced against him, and therefore has the right of appeal therefrom.

3. **MOTION TO SET ASIDE.**—**DISCRETION OF THE COURT.**—**DILIGENCE.**—A motion to set aside a default is addressed to the discretion of the court, and will not be reviewed unless that discretion has been abused. But such motion should disclose a meritorious defense, and reasonable diligence in making it. Although the question of a meritorious defense is the most important, yet in this case the diligence shown is not such as would justify this court in reversing the case on that ground.

APPEAL from the Circuit Court of St. Clair county; the Hon. WM. H. SNYDER, Judge, presiding.

Mr. JAMES M. DILL and Mr. W. C. KUEFFNER, for appellant; contending that the bill of exchange on its face showed it to be the obligation of a corporation, cited 1 Daniel on Negotiable Instruments, 309; Safford v. Wyckoff, 1 Hill, 11; 4 Hill, 442.

Being payable in another State, it was a foreign bill and should

3	271
41	418
43	351
3	271
71	329
3	271
85	667
3	271
a93	*312
3	271
94	*555
3	271
113	*621

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be protested: 1 Daniel on Negotiable Instruments, 8; Mason v. Dousay, 35 Ill. 424.

The default should have been set aside: Mason v. McNamara, 57 Ill. 274; Sourbry v. Fisher, 62 Ill. 135.

Proof of the character in which defendants signed the bill may be shown: Byles on Bills, 27; Haile v. Pierce, 32 Md. 327; Mechanics Bank v. Bank of Columbia, 5 Wheat. 326; R. F. & P. R. R. Co. v. Snead, 19 Gratt. 354; Brockaway v. Allen, 17 Wend. 40; 11 Mass. 97; 31 Mo. 193; 40 Mo. 69; 7 Cal. 535; 5 B. Mon. 51; 2 Conn. 680; 8 Cow. 31; 19 Me. 352; 16 Vt. 220; 2 Met. 47; 6 How. 371; 2 Ala. 274; 9 Barb. 529; 7 H. & J. 409; 21 Conn. 627; 16 Ga. 458; 1 Kernan, 200; 1 Cranch, 105; 49 N. Y. 390; 15 Wall. 664; 47 N. Y. 597; 9 Gratt. 68; 5 Wall. 689; 21 Pick. 490; 1 Clifford, 519.

Messrs. KOERNER & TURNER, for appellees; that on a judgment by default, defendant is precluded from raising the question whether the paper was properly indorsed, cited Underhill v. Kirkpatrick, 26 Ill. 84.

The paper shows a personal liability of defendants: Powers v. Briggs, 79 Ill. 493; Burlingame v. Brewster, 79 Ill. 515.

BAKER, J. Appellees sued appellant, and John Thomas, in the St. Clair Circuit Court, in an action of assumpsit. The declaration contained three special counts, and the common counts. The following bill of exchange was specially counted on:

“OFFICE OF BELLEVILLE NAIL MILL CO.

“\$223.51

BELLEVILLE, ILLS. NOV. 15th, 1875.

“Three months after date, pay to the order of T. Swarthoust & Co. two hundred and twenty-three 51-100 dollars, value received, and charge the same to account of Belleville Nail Mill Co.

“JOHN THOMAS, Vice-Pres't.

“JAMES C. WAUGH, Sec'y.

“No. 188.

“To F. H. PIEPER, Treasurer,
BELLEVILLE, ILLS.”

Across the face of said instrument the following was written:

“Accepted, payable at the Continental Bank, St. Louis, Mo.
“F. H. PIEPER, Treasurer.”

Thomas filed the general issue, and also a stipulation that all his evidence might be given under it. A default was taken against appellant, and the clerk assessed the damages, and the court rendered final judgment against him for \$225 and costs. During the then term of the court, appellant moved the court to set aside said default, and filed an affidavit in support of his motion. But the court overruled said motion, and appellant excepted. A motion in arrest of judgment was also entered by appellant and overruled by the court, and an exception taken.

Appellant brings the record to this court, and assigns various errors.

It is urged that the court erred in overruling the motion in arrest of judgment, because the bill of exchange shows upon its face that it is the paper of the Belleville Nail Mill Company, and also because the declaration does not aver that it was protested. If either or both of these propositions were admitted as correct, still this would not help the case of appellant, so far as the motion in arrest is concerned. As has been stated, the declaration, in addition to the special counts, contains the common counts; and when there is a good count in the declaration to support the judgment, a motion in arrest cannot prevail. *Bradshaw v. Hubbard*, 1 Giln. 390.

Nevertheless, the motion in arrest should have prevailed herein, and it was error to render final judgment against appellant. The action was against two joint contractors, and process was served upon both. A plea was filed by one only, and a default was entered against the other. There was an assessment of damages, and a final judgment against the defendant in default, and no proceeding whatever was taken as to the defendant who filed a plea. After the default of appellant was entered, the issue as to the other defendant should have been tried, and the same jury that tried that issue should have assessed the damages against both. The rule is inflexible, that in actions on contract against two or more, and all are served with process, judgment must go against all or none; for, as a contract is indivisible, so is the judgment thereon.

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The only exceptions to this rule are where the defense is personal—such as infancy or bankruptcy. *Dow v. Rattle*, 12 Ill. 373; *Briggs v. Adams*, 31 Ill. 486; *Faulk v. Kellums*, 54 Ill. 188.

Appellant has a substantial interest in having the judgment joint as to himself and his co-defendant, and the judgment might be immediately enforced against him, and therefore he has the right of appeal. *Freeman on Judgments*, § 35, and cases there cited.

It is also urged that the circuit court erred in refusing to set aside the default entered against appellant. The rule is that the motion to set aside a default is addressed to the discretion of the court, and that ordinarily the appellate court will not review its exercise, but only do so in furtherance of justice, when that discretion has been wrongfully and oppressively exercised. *Freeman on Judgments*, Chap. 7; *Greenleaf v. Roe*, 17 Ill. 474; *Rich v. Hathaway*, 18 Ill. 548; *Scales v. Labor*, 51 Ill. 232; *Mason v. McNamara*, 57 Ill. 274; *Dowberry v. Fisher*, 62 Ill. 135. Applications to set aside a default should show a meritorious defense, and a reasonable degree of diligence in making it. In our opinion a meritorious defense was shown in the application. The affidavit states that the only and sole cause of action is the bill of exchange, a copy of which is given above, and that said bill is the paper of the Nail Mill Company, and not the paper of appellant, and the details of the transaction are given in full in the affidavit. The paper itself, upon its face and as declared on in the special counts, seems to indicate that it is the paper of the Nail Mill Company. The direction to charge to account of Belleville Nail Mill Co., and the fact that the bill is headed as issued from the "office of Belleville Nail Mill Co.," seem to indicate that it is its bill. 1 *Daniel on Negotiable Instruments*, §§ 410, 411; 1 *Parsons on Notes and Bills*, Chap. 5, § 10. We do not regard the cases of *Powers v. Briggs*, 79 Ill. 493, and *Burlingame v. Brewster*, 79 Ill. 515, as repugnant to our conclusions. In the first case the persons signing the note expressly professed to bind themselves, and added the words, "the trustees of the Seventh Presbyterian Church," to indicate the capacity or trust in which they acted; and in the latter case the body of the note

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showed a personal undertaking inconsistent with the idea of corporate liability.

In applications to set aside default, we regard the point of a meritorious defense as altogether the more important of the two required, and where the judgment is evidently unjust, a certain degree of neglect may, especially as terms can be imposed, be held to be excusable. Freeman on Judgments, §§ 114, 541.

In this case, however, the diligence shown by the affidavit of appellant is not such as would justify this Court in reviewing the action of the Circuit Court, and holding that the overruling of the motion to set aside default was error.

But, as there was error in rendering final judgment against appellant, while leaving undisposed of the issue as to his co-defendant, the judgment is reversed and the cause is remanded.

Reversed and remanded.

SARAH TALBOT ET AL.

v.

ELIZABETH C. ROUNTREE.

1. WILL—CONSTRUCTION—LEGACY—UPON WHAT PROPERTY CHARGED.

—The first clause of testator's will, after devising to his wife the use, during her life, of all his real estate, concluded: "Also all my household and kitchen furniture, goods, chattels, moneys and effects belonging to me at the time of my death, to have the said personalty as her own, with authority to sell and dispose thereof as she may deem best, but subject to the payment of the bequest to E. hereinafter named." The bequest to E. was of such a sum as would produce an annual income during her life of \$150. *Held*, that this specific bequest was not a charge upon the real estate; but it appearing that the widow had come into possession of sufficient personal estate to make provision for its payment, and had elected to take under the will, it was not error to render a personal decree against her for the payment of the amount due on the bequest, and to enforce future compliance with the bequest, the court might order the widow's interest in the lands sequestered.

2. RESIDUARY LEGATEE—SEQUESTRATION OF LANDS.—The testator's daughter was made residuary legatee, after the death of the widow, of all the lands and personalty. *Held*, that it was competent for the court to make the payment of this legacy a charge upon all the interest of the widow, but that

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the court erred in ordering a sequestration of the lands for the payment of the specific legacy to E. for a longer period than the life of the widow. By the terms of the will, the residuary legatee will become charged with the payment of this specific legacy, but until she comes into possession this liability will not attach.

ERROR to the Circuit Court of Washington county; the Hon. GEORGE W. WALL, Judge, presiding.

Mr. S. L. BRYAN and Messrs. J. A. & A. L. WATTS, for plaintiffs in error; that the specific legacy was to be paid out of the personal estate, and that not being sufficient, the legacy abated, cited *Heslop v. Gatton*, Ex'r, 71 Ill. 528; *Redfield on Wills*, title, *Abatement of Legacy*.

Mr. P. E. HOSMER and Mr. JAMES M. ROUNTREE, for defendant in error; that the specific legacy became a charge upon the real estate, cited 2 *Redfield on Wills*, § 208; *Lapham v. Clapp*, 10 R. J. 543; *Willis v. Watson*, 4 Scam. 64; 1 Scam. 276; 4 *Gilm.* 329; 53 Ill. 325; 6 Ill. 45.

Upon the rule for construction of Wills: *Smyth v. Taylor*, 21 Ill. 296; *Boyd et al. v. Strahan et al.* 36 Ill. 355; *Siegwald v. Siegwald*, 37 Ill. 430; *Brownfield v. Wilson et al.* 78 Ill. 467.

ALLEN, J. This was a bill of chancery, filed by defendant in error, alleging that H. H. Talbot died testate, and, among other bequests, bequeathed to defendant in error, during her life, the sum of \$150.00 yearly, to be paid in installments of \$75.00, semi-annually; that by his will the testator ordered that a sufficient sum be placed at interest, by the executor or the wife of deceased, as they might agree, to bring the sum of \$75.00, half yearly, to be placed to the credit of defendant in error in the bank; that the bequest was by said will made a charge against the real estate of deceased; that the executor has paid over to widow of deceased under the will all the personal estate; that the widow and executor have failed and refused to place at interest a sufficient sum to provide for payment of bequest to defendant in error; that there is due defendant

in error the sum of \$75.00, which by the will fell due July 1st, 1877; and charges that the widow is aged, and the residuary legatee, Emily Brown, is managing her affairs, and will waste the whole estate if not restrained. Bill prays judgment for the installment due, and asks for the appointment of a receiver to collect rents of real estate, to raise a fund to be placed at interest for benefit of defendant in error.

Plaintiffs in error answered and denied all material allegations in bill; also insisting that the bequest to defendant in error was not made a charge on real estate, but was a specific charge upon the personal estate, and claimed that if the personal estate was not sufficient to pay the bequest, it failed.

The court rendered a decree against Sarah Talbot, widow, and George W. Akin, executor, for \$76.50, and ordered an execution to issue for that sum and costs, against Sarah Talbot, and that George W. Akin, executor, pay in due course of administration; and further decreed that said Sarah Talbot and George W. Akin, executor, pay into the Washington County bank a sum sufficient to raise at semi-annual interest the sum of seventy-five dollars, or that they deposit notes secured by deed of trust on real estate to an amount sufficient to raise from interest thereon the sum of \$75.00, semi-annually, to be paid to defendant in error; and that in default to do so in 30 days, that the sheriff of Washington county sequester all the real estate of said Sarah Talbot (except the place on which she resides), or so much thereof as may be necessary to bring from the rents thereof the sum of \$75.00 semi-annually, and to collect the rents and pay the same in, or deposit the said sum on or before the first days of January and July of each year, during the natural life of the complainant (defendant in error), or during the refusal of the said George W. Akin and Sarah Talbot to create and establish such fund; said amount so deposited to be subject to the order of said complainant (defendant in error).

The controversy in this case grows out of the construction to be given to the will of H. H. Talbot, the husband of one of the defendants to the bill, Sarah Talbot, and the father of defendant in error, and of Emily Brown, plaintiff in error.

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The provisions of the will under which the controversy arose are as follows:

"*First.* I give, devise and bequeath to my wife, Sarah Talbot, during her natural life, the possession, use, control, rents, issues and profits of all my real estate, now owned by me, and hereinafter described, so far as the same remains undisposed of at my death, and any real estate hereafter acquired by me, and owned by me at the time of my death; *also*, all my household and kitchen furniture, goods, chattels, moneys and effects belonging to me at the time of my death; to have the *said personalty* as her own, with authority to sell and dispose thereof as she may deem best, but subject to the payment of the bequest to Elizabeth C. Rountree hereinafter made.

"*Second.* I give, devise and bequeath to my daughter, Elizabeth C. Rountree, in fee simple, lots No. forty and forty-two in Barger's addition to Nashville, and the sum of one hundred and fifty dollars yearly, so long as she lives, to be paid her in half-yearly installments of seventy-five dollars each; to be paid her at the Washington County Bank, in Nashville, Illinois, on the first days of January and July, promptly, by my wife or executor, *as they may agree*. And to provide for the payment of this bequest I hereby direct that a sum sufficient to bring that amount at least, be deposited in said bank, or loaned out and well secured; and the interest arising from said deposit or loan be placed to the credit and subject to the order of my said daughter to the amount of one hundred and fifty dollars yearly, as above.

"*Fifth.* I give, devise and bequeath to my daughter, Emily Brown, in fee simple, after the death of my said wife, lot No. eight, and east third of the south two-thirds of lot No. six, both in block No. four, in the Town of Nashville; and all the residue of my goods, chattels, household and kitchen furniture, moneys and effects remaining unexpended after my wife's death, subject, however, to the payment every six months of the bequest to Elizabeth C. Rountree, during her natural life, as hereinbefore provided for."

The first question that is presented by plaintiff in error is: Does this will make the bequest to defendant in error a charge

upon the real estate of the testator? After devising to his wife, Sarah Talbot, during her natural life, the possession and control, issues, rents and profits of all the real estate that he might own at his death; also all household and kitchen furniture, goods and chattles, moneys and effects at his death, to have said personalty as her own, with authority to sell and dispose of as she might deem best, "but subject to the payment of the bequest to Elizabeth C. Rountree hereinafter made." Now, what is it that is subject to the bequest of Elizabeth Rountree? Is it the real estate devised to the widow during her life, the rents and profits issuing out of the real estate? or is it the personalty that the widow takes, that is to become subject to the bequest of Mrs. Rountree? In the construction of wills we must give to their language the primary acceptation of the word used: "for we are told that a testator is always presumed to use words in which he expresses himself according to their primary acceptance." Wigram on Wills, p. 55. Unless from the context of the will it appears that he used them in some other sense. Now, by the terms of this clause of the will, Mrs. Talbot was to have the personalty, subject to the bequest to Mrs. Rountree. The word personalty has a strict and primary sense, and is applied to chattels personal, things movable, as contradistinguished from things real or attached to the realty. In construing this clause of the will, then, we cannot reject the word personalty used by the testator, for no word in a will can be rejected and another substituted for it, without the clearest certainty that it was the intention of the testator to use the word in some other sense. Redfield on the Law of Wills, p. 471-2.

We fail to find anything in the context that warrants a different interpretation, or that the testator intended to use the word personalty in any other than its primary sense, but we do find in the context that which strengthens us in the opinion that it was only the bequest of the personal estate that was to be subject to the bequest to Mrs. Rountree.

The second bequest gives to Elizabeth C. Rountree lots 40 and 42, in Barger's addition to Nashville, in fee simple, and the "sum of \$150 yearly, so long as she lives, to be paid her in

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half-yearly installments of \$75.00 each, to be paid at the Washington county bank, &c., by my wife or my executor, as they may agree." Now, the executor only had to do with the personalty. The real estate was to go to the widow during her life and to the devisees named in the will at her death.

Again, in the 5th clause in the will, the testator devises and bequeaths, after the death of the widow, lot 8 and $\frac{1}{2}$ of S. $\frac{3}{4}$ of lot 6, block 4, in Nashville. "The residue of his goods, chattels, household and kitchen furniture, moneys and effects, remaining unexpended after my wife's death, subject, however, to the payment every six months of the bequest to Elizabeth Rountree, as hereinbefore provided."

Taking the three clauses of the will together and giving them a construction consistent with each other, we are clear in our conviction that it was not the purpose of the testator to make the bequest to Mrs. Rountree a charge upon the real estate, but that it was his purpose to provide that out of the personal estate provision should be made to secure to her this \$150 annually, and that it was the duty of the executor to see that done as directed in the will, and that Mrs. Talbot, the widow, in electing to take under the will and in receiving the bequest of the personalty, became chargeable with the bequest to Mrs. Rountree during her life, and that Mrs. Brown, as the residuary legatee of the personalty, will take it subject to the payment of the bequest. This view of the question harmonizes with the other provisions in the will. This leads us to a consideration of the decree rendered by the Circuit Court herein. The court found from the evidence that the widow had received from the executor \$1,300, and from rents from real estate \$2,900. Plaintiffs in error insist that the widow could not in any event be held liable to defendant for more than the interest on \$1,300, inasmuch as that was all from the personal assets that she received from the executor. The record shows that the executor was made a witness and testified in the cause below. It is possible that something in his testimony may have led the court to conclude that the widow had received more than the \$1,300, for which she was chargeable.

The records show that \$2,918.25 was received by the widow

from the executor for rents from real estate. Whether any portion of this rent had accrued and was due at the death of testator, or whether it was rents that accrued after his death, is left to mere conjecture. All rents due at the date of the testator's death would go to the executor as personalty, and would form a part of the personal estate of the testator, which by the terms of the will, would be subject to the payment of the bequest to Mrs. Rountree. Rents that accrued afterward would go, under the will, directly to the widow, and would not be subject to this bequest. From the fact that the executor was handling the rents, and in the absence of any proof that he was acting as the agent of Mrs. Talbot in collecting them, and the fact that he charged himself with them, and credited himself when he paid them over, and that he settled in the County Court upon this basis, would indicate that the rents had accrued before the death of the testator, and from the record we take that view. If this view is correct, then Mrs. Talbot has from the personal estate of the testator an abundant sum out of which she may secure to defendant in error the \$150 per annum, and becomes liable personally for it, and it was not error for the court to so find and so decree.

The bill charges that the executor and the widow were in default in the payment of one installment of \$75.00, and the court find that charge to be sustained by the evidence, and for that sum and the accrued interest, rendered a personal decree against the widow for that installment and the interest. It is insisted by plaintiffs in error that the court had no right to render a personal decree against Mrs. Talbot, but we believe that, having accepted under the will, and having taken the personalty, she was personally liable to defendant in error for whatever was due and unpaid.

The bill charges a refusal by Mrs. Talbot and the executor to secure to defendant in error her bequest to so place a sufficient sum at interest as to raise \$150 a year, for the use of defendant in error. The answer admits that this has not been done. The record shows the widow, Mrs. Talbot, had it in her power to do this; that she failed to do so. A court of equity has power to compel her to comply with the conditions upon which she

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enjoys the bequest in the will, and to accomplish this, has power to render against her such decree and sequester her property, and the rents, issues and profits of any lands to which she is entitled, either in fee or for life, to the end that defendant in error may have that to which the will entitles her. Revised Statutes, Chap. 22, § 42. But in doing this, due regard must be had to the rights of others under the will. Since the will only makes the payment of this bequest or legacy a charge on the personalty, a court of equity would not be authorized to charge its payment upon any of the lands beyond the natural life of the widow, Mrs. Talbot. It could not become a charge upon the lands which go by the will to Emma Brown, after the death of her mother, nor to any other lands which are devised by the will to other devisees upon the death of Mr. Talbot. By the terms of the will the residuary legatee, Mrs. Brown, will become personally liable for the payment of the bequest as the legatee, but until she comes into possession, this liability will not attach. It was competent for the court to make the payment of this bequest a charge upon whatever interest Mrs. Talbot had in the lands, and to sequester the rents, issues and profits to an extent sufficient to secure the payment of the bequest during the life time of Mrs. Talbot; but upon the death of Mrs. Talbot these lands go, under the will, immediately to the other devisees in the will, and to sequester lands devised to Sophia Brown (and Ida Rountree, by the 3d and 4th clauses in the will), after these lands vest in them upon the death of Mrs. Talbot, would be to violate the provisions of the will by which these lands and the rents, issues and profits all go to them.

The decree of the Circuit Court makes the sheriff a receiver, and directs him (in the event that the executor and widow fail to make the provision required by the will) to sequester the rents of all the lands owned by the widow (except the place where she resides), and to collect the rents and pay to complainant in the bill (defendant in error) \$75.00, or deposit the same to her credit in bank on the 1st days of January and July in each year during her natural life. This decree would make the bequest a charge upon the lands devised to Mrs. Talbot beyond her natural life, if defendant in error survived her, and throw

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the burden of this bequest upon whoever took the lands under the will at the death of Mrs. Talbot. This would, in our judgment, violate the provisions of the will. We believe the Circuit Court erred in decreeing a lien upon the lands, and sequestrating the rents and profits beyond the natural life of Mrs. Talbot, and for this reason we reverse the decree of the Circuit Court.

Reversed and remanded.

DAVID T. BONNELL

v.

DAVID B. LEWIS.

8	258
56	318
3	253
76	608
8	233
95	1429

1. PRACTICE IN CHANCERY—FACTS MUST APPEAR IN THE RECORD.—It is the established doctrine in this State that the evidence or the facts on which the decree is based must appear somewhere in the record. It is not essential that they should be embodied in the decree. If they are already a part of the record in the cause, by being contained in the Master's report, or in depositions taken as the law requires, or in exhibits, or are made a part of the record by a certificate of evidence, it is sufficient. If not thus preserved, they must appear upon the face of the decree.

2. EXCEPTIONS TO THE RULE.—Proceedings for mechanic's lien are an exception to the general rule above stated. So, also, where the decree is based upon the verdict of a jury in an issue out of chancery, the evidence heard by the jury need not be preserved in the record. But if in such case the court should enter up a decree contrary to the verdict, such decree must be sustained by evidence contained in the record.

ERROR to the Circuit Court of Jersey county; the Hon. CYRUS EPLER, Judge, presiding.

Mr. JAMES H. ENGLISH, for plaintiff in error.

BAKER, J. The bill filed in this cause was for an injunction, and to redeem lands sold on execution.

In the record there is no certificate of the evidence, or bill of exceptions, or master's report, or finding in the decree of any of the specific facts necessary to sustain the decree. With

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the record, but not properly a part thereof, we find a number of loose *ex-parte* affidavits that appear to have been presented to the Judge in vacation, at chambers, upon a motion to dissolve the injunction; but these affidavits were not, unless by agreement of parties, admissible in evidence on the final hearing. No such agreement is shown, nor is there anything whatever in the record tending even to show that they were used on the hearing.

It is the established doctrine in this state that the evidence or the facts on which the decree is based, must appear somewhere in the record, but they do not appear in this, unless we are prepared to hold that the statement in the decree that the cause come on to be heard on the bill, answer, replication, and proofs, and that the court, having heard the evidence, found that the said bill, and each and every allegation thereof was true, is a sufficient finding of the facts to sustain the decree.

Under the old English chancery practice, the decree not only recited the evidence as the facts upon which it was based, but contained recitals of the pleadings in the cause. Where a decree was rendered which did not recite the facts upon which it was founded, or which the court considered as proved, it was error apparent on the face of the decree. *Brend v. Brend*, 1 *Vernon's Ch. Rep.* 213; *Bonham v. Newcomb*, *Idem*, 215; 2 *Daniell's Chy. Pl. and Pr.* 10, 20, and notes; *Burdine v. Shelton*, 10 *Yerg.* 41.

In 1st *Harrison's Ch. Pr.* 108, it is said that the facts which were proved and allowed, viz: alleged by the court to be proved, must be particularly mentioned in the decree.

In *Broad v. Broad*, 2 *Ch. Ca.* 161, Lord North declared and was clearly of opinion that it was not enough to say "on reading the proofs it is decreed, but on reading the proofs it appeared thus and thus, and it is therefore decreed."

In the United States the decrees are usually general, and contain a mere reference to the pleadings, and for the purpose of examining all errors of law the pleadings, exhibits, depositions regularly taken and on file in the cause, and master's report, are as much a part of the record before the court as the decree itself.

And such is the doctrine in this State. In England, and for the purposes of a bill of review, that which was not in the decree was not considered a part of the record, and therefore in all cases the facts were required to be set forth in the decree itself. But with us it is otherwise; here it is not absolutely essential that the facts should be embodied in the decree. If the facts necessary to support the decree are already a part of the record in the cause, by reason of being contained in the master's report, or in depositions taken as the law requires and on file in the cause, or in exhibits, or are made a part of the record by the certificate of the judge or a bill of exceptions, then they may be omitted from the decree, and the decree yet be not erroneous. Even in such case it is much the safer and better practice to incorporate them in the decree.

If the specific and essential facts, or evidence thereof, upon which the decree is predicated, are not otherwise preserved, then they must necessarily appear upon the face of the decree. It is a *sine qua non* that the facts are in the record.

We would refer to *Moore v. School Trustees*, 19 Ill. 88; *Wilbite v. Pearce*, 47 Ill. 413; *Durham v. Mulkey*, 59 Ill. 91; *Ward v. Owens*, 12 Ill. 283; *Nichols v. Thornton*, 16 Ill. 113.

Upon a writ of error in a chancery cause, the court will not presume that any evidence was given in the court below, except what appears in the record. The testimony of the witnesses or the facts proved by them must appear in the record. *Reddick v. State Bank*, 27 Ill. 148; *White v. Morrison*, 11 Ill. 361; *Osborn v. Horine*, 17 Ill. 92; *Stacy v. Randall*, 17 Ill. 467.

There are some exceptions to the general rule. A bill taken for confessed is not an exception, for there the bill itself is evidence of the facts well alleged therein, and it is a part of the record.

But a contrary rule is held applicable to proceedings under the mechanics' lien law, and in this respect they are unlike other chancery proceedings. In such cases the practice has never obtained in this State of preserving the evidence in the record as a necessary support of the decree. *Kelly v. Chapman*, 13 Ill. 530; *Ross v. Derr*, 18 Ill. 245; *Kidder v. Aholtz*, 36 Ill. 478; *Lewis v. Rose*, 82 Ill. 574.

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So, also, if an issue out of chancery is submitted to a jury, and the decree of the court is based upon the verdict of the jury, it is not requisite that the evidence should be preserved; but if in such case the court enters up a decree contrary to the verdict, such decree must be sustained by evidence contained in the record. *Thatcher v. Thatcher*, 17 Ill. 63; *Becker v. Becker*, 79 Ill. 533; *Shillinger v. Shillinger*, 14 Ill. 147; *Wheeler v. Wheeler*, 18 Ill. 39; *Davis v. Davis*, 30 Ill. 180; *Hawes v. Hawes*, 33 Ill. 286; *Bowman v. Bowman*, 64 Ill. 75; all, or most of which, are referred to by appellee in his brief, were without exception decrees entered *pro confesso* on bills for divorce, and that evidence was required to be heard at all was owing to a statutory requirement. It is not necessary to preserve in the record of a divorce suit the proofs heard by the court on a decree *pro confesso*. In *Shillinger v. Shillinger*, *supra*, which is the leading case of this character, and which construes the statute requiring proofs in such case, the court says: "It is not necessary that the evidence upon which the court acts should be preserved in the record; but it will be sufficient if the record shows that the court heard evidence and found the allegations of the bill to be true." In *Davis v. Davis*, *supra*, it was expressly shown in the decree that the court heard proof and was "satisfied of the truth of the allegations as in the said complainant's bill alleged and set forth," and the court disposed of the matter by saying: "This complied with the law—it is not necessary that the proof should appear in the record." The other cases cited are to the same effect, and show that a general finding, in so many words, that the allegations of the bill are true, is not regarded as a compliance with the requirement in ordinary chancery causes that the facts or the evidence must be preserved in the record; but that such divorce proceedings, like proceedings under the mechanics' lien law, are considered exceptions to the general rule.

And such has uniformly been the understanding and the practice of the bar, and it is difficult to see why any safe and prudent practitioner, if a statement in the decree that the court found from the evidence each and every allegation of the bill to be true is sufficient, should draw up his decree by setting

forth in detail the facts found, and thereby jeopardize the rights and interests of his client by a possible omission of that which might be regarded by the appellate court as a material fact. We are wholly unable to perceive any material difference between finding all the allegations of a bill to be true, and finding each and every allegation of a bill to be true.

The practice contended for would be loose and unsatisfactory; it would be impossible to know with any certainty upon what grounds the court founded its decree, and such practice might be conducive to fraud and oppression.

The statement in this decree is not a statement either of the evidence or of the facts proved, but it is a mere statement of the conclusion of the court from the evidence or from the facts proven.

We are of the opinion, therefore, that both the errors are well assigned, and that the Circuit Court erred both in finding the issues for the defendant in error, and in rendering a decree in his favor; for there is nothing whatever in this record to justify such finding or upon which to base such decree.

The decree is reversed and the cause remanded.

Reversed and remanded.

ALLEN, J. I dissent from the opinion of a majority of the court in this case. The court finds from the evidence each and every allegation of the bill to be true. The bill is a part of the record, and the court finds each allegation supported by the evidence. Would it be any stronger if each allegation of the bill was specifically mentioned, and a special finding as to that specific amount? This, it is admitted, would be a sufficient finding, and I do not believe that the decree in this cause should be reversed because it does not thus specifically find. This finding is not a general finding by the judge, but a finding on each and every allegation in the bill, and for this reason, I cannot concur with a majority of the court.

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EDWARD S. WILSON

v.

JOHN P. HIGGINS.

EVIDENCE—BURDEN OF PROOF.—It is a fundamental rule in judicial determinations, that to enable a plaintiff to recover, he must support his alleged cause of action by a preponderance of testimony.

APPEAL from the Circuit Court of Richland county; the Hon. JOHN H. HALLEY, Judge, presiding.

Messrs. WILSON & HUTCHINSON, for appellant.

TANNER, P. J. This cause was tried on appeal from a justice of the peace. The facts were submitted to a jury, and verdict returned in favor of the appellee. A motion for a new trial was made, overruled, and judgment rendered on the verdict. The appellant excepted to the rulings of the court, and brings the case to this court by appeal, and alleges for error the refusal to grant a new trial.

We think the error well assigned. It is a fundamental rule in judicial determinations that to enable the plaintiff to recover, he must support his alleged cause of action by a preponderance of testimony. The appellee has not done so in this case. The testimony is brief, and we give it entire as it appears in the bill of exceptions:

Plaintiff testifies: "I was in court house; defendant called me out and asked me if I would sell him a wagon; I agreed to let him have a wagon; he wanted to get one on account of John W. Brothers; I agreed to let him have one—he to give me a note on Brothers; I was up here (Olney) and saw Wilson soon after, and told him the wagons were on the road. When they came I was putting them together, and Richard Rowland came after a wagon for Wilson; I asked him if he had Brothers' note; he said he knew nothing about any note; Rowland said Wilson was not at home; I then told him to take the wagon home and keep it till Saturday—merely as a loan—by which

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time I would see Wilson, and if he did not get Brothers' note he could return the wagon; I afterwards named the matter to Wilson. When I sold the wagon Brothers was in Illinois; he afterwards moved to Indiana; and Wilson agreed to go down with me and help me make the money out of him; I asked him to do so once or twice, but he never did so; Brothers has since died; I then asked Wilson about paying for the wagon; he said he owed me nothing—that my debt was due from Brothers; I then sued him for the wagon; it was worth \$100."

Sabins Blair testified: "I was helping Higgins put up some wagons. Richard Rowland came there and wanted a wagon. Higgins refused; Rowland said he must have it. Higgins then said he would lend it to him till Saturday, when he would see Wilson about it. Then Rowland took the wagon. He was working for Wilson. The wagon was worth \$100 cash." Plaintiff rested.

E. A. Wilson, defendant, testified: "I got a wagon from Higgins; it's a long time since. We, Wilson & Hutchinson, were litigating for John W. Brothers, and he owed our firm largely. We asked him for pay. He had no money, but said "he had a deal with John P. Higgins, the plaintiff, and that if we could use a wagon and would give him credit for \$100, he would make arrangements with Higgins by which we should get a wagon. We consented, and he afterwards came to our office and said he had made the arrangements with Higgins, and it was all right. I saw Higgins shortly afterwards, and told him Brothers owed Wilson & Hutchinson, and had agreed to see him, and arrange to get a wagon of him, which he (Higgins) was to charge to Brothers, and for which we, Wilson & Hutchinson, were to give Brothers credit for \$100. Higgins said Brothers had seen him, and that it was all right; that he had a car-load of wagons on the road, and when they came we should send and get one. When they came I sent Rowland with my team to get a wagon. He got it. There was no arrangement by which we were to get Brothers' note. Brothers said he would arrange with Higgins for the wagon. Higgins said Brothers had made the arrangement, and we got the wagon, and

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gave Brothers credit for it. Don't know what the arrangement between Higgins and Brothers was. We never agreed, and I never agreed to get Brothers' note. Higgins never spoke to me about it for more than two years. When we got this wagon and gave Brothers credit for it, Brothers was good. Two years (or more) after that Brothers had failed, and after his failure, Higgins came to me and said Brothers had not paid him for the wagon, and he thought I ought to pay. I told him I had nothing to do with the matter; that credit had been given Brothers on the firm books for the wagon, and that I had settled with my partner for his half of it, and it was his carelessness if he had lost it. Still later he came to me again and said Brothers had property in Indiana, but it was so covered up with mortgages that he was afraid to attempt to make it. I told him I would go over with him to try to help him find a levy any time he wanted to go, but he never came, and I never heard any more of it till I was sued. "I did not buy the wagon of Higgins individually. It was got by the firm on Brothers' account, and this Higgins understood at the time." "We never had Brothers' note, and there never was any understanding that we should get it for Higgins. Rowland was not my agent for any purpose, nor authorized to make any contract for me with Higgins; nor did he notify me that Higgins had sent the wagon as a loan, or demanded any note, and I afterward saw Higgins, I presume once a week, to the time he first mentioned the wagon to me, which was two years or more afterwards."

T. W. Hutchinson testified: "Wilson, the defendant, and myself, bought this wagon of John W. Brothers, and paid him for it by giving him credit as agreed upon. He was to get the wagon of plaintiff on a private dealing between them, the nature of which they never explained to me. We first made the bargain with Brothers. Then Wilson told plaintiff what the understanding was, and he consented to it, and promised to furnish us the wagon when his next car-load arrived, which he said was on the way. We never agreed to get Mr. Brothers' note for Mr. Higgins, nor did he ask us to do so. We did not need the wagon—should not have thought of buying it, but as it was offered us on a debt, we accepted it at \$100, and I

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discounted my half of it to Mr. Wilson, giving him \$10 off, and he paid me \$40 for my half."

On cross-examination witness said: "This was five or six years ago; did not remember fully all the circumstances, but was sure the bargain between Brothers and Wilson & Hutchinson was fairly and fully stated to Higgins, and that Higgins agreed to it. The talk was between Wilson & Higgins in witness' presence. Never heard of this claim by Higgins for two or three years after the wagon was got and its value divided. I never authorized Rowland nor any one else to change the bargain under which we were to get the wagon, and never till to-day heard of any claim that he did so."

The appellee is unsupported in his statement that the wagon was to be paid for in a note to be given by Brothers to him, which appellant was to procure and deliver. But appellant is fully corroborated by Hutchinson in his statement of the contract, from which it clearly appears that the wagon was sold to the appellant and T. W. Hutchinson by Brothers, and was delivered in pursuance of an arrangement made by him with the appellee.

It may have been the intention of the appellee at the time he delivered the wagon, to abandon his contract with Brothers, and hold appellant liable, but before he could do so he would have to apprise appellant of the fact, either before the delivery of the wagon, or within a reasonable time thereafter. If delivered to appellant through his agent Rowland, merely as a loan, and not on the contract, it was the duty of appellee to bring this fact to the knowledge of appellant. According to his own statement, he took upon himself the duty of informing appellant that the wagon was a loan. He says: "I told him (Rowland) to take the wagon home and keep it until Saturday, merely as a loan, by which time I would see Wilson." The only expression used by appellee in his testimony, from which even an inference can be drawn that he ever informed the appellant that the wagon was not delivered on the contract with Brothers, is that "I afterwards named the matter to Wilson." But precisely when or what matter he named to appellant we are left to conjecture.

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The appellant states that he was never informed by Rowland or the appellee that the wagon was delivered as a loan, but that about two years after he got the wagon, and after Brothers had become insolvent, the appellee informed him that Brothers had never paid for the wagon. This statement is not denied by the appellee. If the appellee did not deliver the wagon on the contract with Brothers, but merely as a loan, we are at a loss for a reasonable interpretation of this language: "When I sold Wilson the wagon, Brothers was in Illinois; afterwards he moved to Indiana, and Wilson agreed to go down with me and help me make the money out of him; I asked him to do so once or twice." If he sold the wagon to Wilson, why seek to make the money out of Brothers, who was a non-resident, and in nowise indebted to him?

We are satisfied that the verdict of the jury was palpably against the evidence, and should have been set aside and a new trial awarded. The judgment of the Circuit Court is reversed, and the cause remanded.

Reversed.

THE INDIANAPOLIS AND ST. LOUIS RAILROAD COMPANY
v.
JOHN DAWSON.

AGENT—AUTHORITY TO EMPLOY ASSISTANT.—Appellant employed P. as detective to recover a lot of stolen goods and capture the thieves. P. engaged appellee to assist him, telling him that if the company didn't pay him he (P.) would. The evidence failing to show any authority in P. to employ appellee for the company, the verdict cannot be supported.

APPEAL from Alton City Court; the Hon. HENRY S. BAKER, Judge, presiding.

Mr. J. H. YAGER, for appellant; that the authority of the servants of a carrier is a question of fact to be determined by the jury, and the burden of proof is upon the party claiming such

authority, cited 2 Redfield on Railways, 131; Thurman v. Wells, 18 Barb. 500.

A party claiming to be an agent cannot establish such agency by his own uncorroborated testimony: Maxey v. Heckethorn, 44 Ill. 437.

Declarations of an agent, to be admissible as evidence, must have been made in respect to matters within the scope of his employment: Osgood v. Bringhoff, 32 Iowa, 265; Rawson v. Curtis, 19 Ill. 456.

Instructions should be based on evidence in the case: Gibson v. Webster, 44 Ill. 483; Harmit v. Thompson, 46 Ill. 460; Bullock v. Narratt, 49 Ill. 62.

Mr. JOHN J. BRENHOLT, for appellee; that an agent binds his principal by such subordinate acts as are necessary to be done in connection with the principal act, cited 2 Parsons on Contracts, 57.

Where a principal allows his agent to so act as to give one employed by him reason to believe that he is employed by the principal, he will be bound: Gowen Marble Company v. Tarant, 73 Ill. 608.

Appellee supposed, and had a right to suppose, from the conduct of the officers of appellant that the company was his employer: Wilson Sewing Machine Co. v. Boyington, 73 Ill. 534; I. & St. L. R. R. Co. v. Miller, 71 Ill. 463.

ALLEN, J. This suit was brought by appellee against appellant in the City Court of Alton, and tried by a jury. Verdict for Appellee for \$100. Motion for new trial overruled, and judgment for appellee for one hundred dollars and cost, from which judgment the cause is brought to this court on appeal.

Appellee testified that he was marshal of the city; that in 1875 N. B. Prettyman informed appellee that appellant had offered a reward of \$100 for the capture of thieves, and recovery of goods stolen from appellant's cars near Alton; that Prettyman had been acting as detective for appellant, and promised appellee that appellant should pay him, appellee, if he recovered

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the goods, and that if appellant did not pay, he, Prettyman, would; that under the arrangement, he, appellee, passed over appellant's road to Mattoon free of charge; that while in appellant's office in Mattoon, saw Judge Steel, who promised appellee that if he captured the thieves and recovered the goods, he (Steel) would see that appellee was well paid. "I captured the thieves, and they were sent to the penitentiary." "I also recovered the greater part of the goods value \$400." "I don't know if Prettyman had any authority from the company to employ me on behalf of the company."

Dawson, ticket agent, and Burgess, freight agent, both testify as to return of goods captured by appellee.

Dawson says he knows that Prettyman was working the case, and that appellee, was in telegraphic communication with Prettyman at Mattoon.

Lewis Hurvel testifies that he was present with appellee and Prettyman in saloon in Alton. Prettyman said to Dawson, "he would pay Dawson \$100 if he would recover goods and capture the thieves."

Philip Riley testifies that he heard Prettyman say he would pay for all trouble appellee would be at.

On part of appellant, Egbert B. McClure testifies: Was general freight agent for appellant. Appellant hired Prettyman as detective in certain cases. Prettyman had no authority from appellant to employ others; never was regularly employed by appellant; was employed in this case to work it up and recover stolen property, for which appellant promised to pay him \$100 for recovery of goods stolen. Appellant paid Prettyman \$160 for recovery of goods and capture of thieves. Judge Steel was never the regular attorney of appellant; was sometimes employed by it in cases in Mattoon, where he resides. Appellant has no regular detectives; only pays detectives by the job.

The court gave to the jury two instructions, to both of which exceptions were taken by appellant. We discover no objection to the first, but the second instruction is objectionable. It reads as follows:

2. "If the jury believe from the evidence that John Dawson was employed by the Indianapolis and St. Louis Railroad

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Company, and that the company received the benefit of said services, then the jury must find for the plaintiff in any amount not exceeding \$400."

This instruction lends to the jury a very wide discretion. It should have restricted them in their finding to such sum as the evidence showed his services were worth, or to such sum as they believed from the evidence appellant had agreed to pay, but the jury may well have concluded that under this instruction they were only limited in their finding to the sum of \$400.

It was error to give the instruction in that form, but upon the whole evidence in this case, we fail to find enough to support this verdict. It turns upon the question as to whether Prettyman was authorized by appellant to employ others to to capture thieves and goods at appellant's expense. We think the evidence wholly fails to show such authority. Taking the testimony of appellee himself, it leaves the mind in doubt as to whether he regarded himself employed by appellant or by Prettyman, for he says Prettyman told him "if the company did n't pay him he would."

McClure testifies that Prettyman was only employed by the company by the job; never in regular employment, and the same as to Steel's employment. We think the evidence fails to show any authority in Prettyman (or Steel either) to employ appellee, and that the evidence fails to support the verdict of the jury. Judgment of court below reversed and cause remanded.

Reversed and remanded.

BIGGERS McFARLAN

v.

MILLER MCCLELLAN, Adm'r.

1. REPLEVIN—PLEA OF PROPERTY IN DEFENDANT—EVIDENCE.—Under a plea of property in defendant, the defendant has a right to show by what means he came into possession of the property, and his title thereto.

2. BURDEN OF PROOF.—In replevin, where the defendant pleads property in himself, the burden of proof is upon the plaintiff to show his title to the property, or his right to the possession.

8	295
95	1844
8	295
100	884

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APPEAL from the Circuit Court of Hardin county; the Hon. JOHN DOUGHERTY, Judge, presiding.

Mr. W. S. MORRIS, for appellant; that a landlord may enforce his lien against a sub-tenant, cited Rev. Stat. 1874, 661, § 32.

The sub-tenant having knowledge of the mortgage is estopped to deny the lien of his landlord: 2 Indiana Dig. 331; Blackmore v. Sabers, 22 Ind. 466.

On forfeiture of condition in the mortgage, the legal title vests in the mortgagee and becomes complete on his obtaining possession: Constant v. Matteson, 22 Ill. 546; Funk v. Staats, 24 Ill. 644.

Under the plea of property in defendant, the burden of proof is upon plaintiff to show his title or right to possession: 2 Greenleaf's Ev. § 561; Johnson v. Neal, 6 Allen, 227.

ALLEN, J. This was an action of replevin brought before a Justice of the Peace of Hardin County. Was tried and appealed to the Circuit Court, and at the April term for 1878 it was tried by a jury. A verdict for appellee for the property replevied. A motion for new trial overruled, and judgment for appellee for property replevied and cost. Appeal prayed and case brought to this court. The controversy is over the ownership of about 200 bushels of corn claimed by appellee as administrator of Roe Caldwell, deceased, raised by Caldwell on the land of appellant as sub-lessee of Albert Elliott, who held the premises under a lease from appellant. Appellee was administrator.

Appellant was sworn as a witness, and testified that he bought the corn after the death of Caldwell, and paid for it. The court refused to let appellant testify from whom he bought the corn in question, when he bought it, who had possession when he bought, who delivered the corn to him, at what time it was delivered, or what he paid for it.

Appellant then offered to prove that after Roe Caldwell's death he took possession of the corn in question by virtue of a chattel mortgage, dated April 7th 1876, and recorded in accordance with the requirements of the statute, executed by

one Albert Elliott to appellant and one Kirkham, and the court refused to permit the evidence to go to the jury. The original mortgage was then offered in evidence, showing that all the crops grown upon the land of appellant was embraced in the mortgage. But the court refused to let the mortgage be read to the jury. Appellant then offered to prove that he took possession of the corn on the 1st day of March, 1877, but the court refused to let the jury hear the proof.

The appellant then offered to prove that Roe Caldwell was a tenant of Albert Elliott, and that when he took possession of the premises and raised the corn in question, he had notice of appellant's mortgage on the crops grown on the land leased by Elliott from appellant, but the court refused to let the evidence go to the jury.

The court refused the following instruction asked for by appellant:

No. 2. "The jury are instructed that under the plea of property in the defendant, the plaintiff before he can recover must show by a preponderance of testimony that the property in question belongs to him, and under such plea of property, the defendant may show any legal title to the property, no matter how derived." *Per curiam*. "Refused. Under this plea the *onus* is on the defendant."

The jury returned a verdict for plaintiff, and the court overruled a motion for a new trial and rendered judgment on the verdict. An appeal was prayed and allowed to this court.

Among the errors assigned are, that the court refused to permit proper evidence to go to the jury, and that the court refused to give proper instructions for defendant.

Appellant's plea was property in himself, and it will appear at a glance, that it was error to refuse evidence to show when appellant came into possession of the corn, and how he came into possession, or whether by purchase from some one having a right to sell it. For aught that appears in this record, he might have purchased from the administrator himself, or from some one who had purchased it from Roe Caldwell before his death; or he might, for aught that appears, have had some lien upon it for rent or debt that would authorize him to take

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possession, but by the ruling of the court he was estopped from all explanation as to the foundation of his claim to the property or its possession.

Again, the court refused an instruction that "when a defendant pleads property in himself," the plaintiff must show, by "a preponderance of the evidence," that the property in question belongs to plaintiff, etc.

The rule is as stated in the instruction. When a defendant pleads property in himself, the *onus* is on the plaintiff of proving his title to the property or his right to the possession. Greenleaf on Evidence, 2 Vol. §§ 499, 500 and 561.

Several other errors are assigned, some of which are worthy of consideration, but these are so manifest that we content ourselves with these reasons for reversing the judgment of the Circuit Court and remanding the cause.

Reversed and remanded.

JOHN GIBBON

v.

SILAS L. BRYAN, Adm'r.

1. GARNISHMENT—FORM OF JUDGMENT.—In garnishment the judgment should be in favor of the defendant in execution for the use of the plaintiff against the garnishee.

2. FOUNDATION FOR GARNISHMENT PROCEEDINGS—RETURN OF EXECUTION—AFFIDAVIT.—To give the court jurisdiction in garnishment there must have been a return *nulla bona* of the execution, and a proper affidavit, under the statute filed. While the Circuit Court is a court of general jurisdiction, and entitled to all presumptions in favor of its common law jurisdiction, this presumption ceases when it undertakes to administer a statute passed in derogation of the common law.

ERROR to the Circuit Court of Marion county; the Hon. AMOS WATTS, Judge, presiding.

Mr. B. B. SMITH, for plaintiff in error; that the filing of an affidavit is necessary to give the court jurisdiction, cited Rev. Stat. Chap 62, § 1.

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The answer does not show that the debt was due when judgment was rendered: *Pierce v. Carrollton*, 12 Ill. 358.

Judgment should have been rendered for the whole amount due: *Gillilan v. Nixon*, 26 Ill. 50; *Farrell v. Pearson*, 26 Ill. 463.

Messrs. POLLOCK & SON, for defendant in error; that an affidavit is not necessarily a jurisdictional fact, and appearance and answer of the garnishee without objection, gave the court jurisdiction: cited *Nat. Bank v. Titsworth*, 83 Ill. 591; *Baldwin v. Murphy*, 82 Ill. 485; *Phelps v. Reeder*, 39 Ill. 172.

The objection cannot be first made in this court: *Chanute v. Martin*, 25 Ill. 63.

There being no dispute as to amount or proper parties, this court can render a proper judgment: *Prince v. Lamb*, Breese, 378; *Boyle v. Carter*, 24 Ill. 51.

ALLEN, J. On the 24th of August, 1876, defendant obtained a judgment, in the Marion Circuit Court, against Esther Aird for the sum of \$514.66 and cost. Execution was issued on the judgment and levied on certain lots, describing them in Aird's addition to Odin, and on July 14th, 1877, were struck off at a sale to defendant in error, for the sum of \$5.00. The following indorsements appeared on the execution, after the date that it came to hand, and the date of the levy on the lots, describing them: "The within described property was offered for sale on the 16th of June, the time advertised for sale; there being no bids, the sale was adjourned over to the 18th at 2 o'clock.

"The within described lots were offered Monday, June 18th, 1877, the time set by adjournment. There was no sale, there, being no bidders.

"A. J. HARVEY, Sheriff.

"The sale of this property was July 14, and was sold to Silas L. Bryan for the sum of five dollars.

"A. J. HARVEY, Sheriff.

"This execution is entitled to a credit of five dollars by sale of the above described lots, this July 14, 1877. The

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sheriff never received any money on this execution July 14th, 1877.

“A. J. HARVEY, Sheriff.”

Then follows sheriff's costs indorsed on execution. These indorsements are all that appear on the execution.

On the 23d of July, 1878, an instrument purporting to be an affidavit was filed in said court, the substance of which is as follows:

“S. L. BRYAN, Administ'r of Estate of William Aird, v. ESTHER AIRD.	}	Garnishment on Judgment.
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“Affidavit of S. L. Bryan states that at the Aug. term, 1876, of this court, he got judgment in his capacity as administrator of Wm. Aird's estate, for the sum, as he believes, of \$514, and costs, or about that sum. That an execution was issued, and nothing made; and afterwards an execution was issued and levied on all the property of defendant, and advertised; and afterwards a *pluries* execution was issued and levied on real estate, and the plaintiff bid it off for \$5.00; that the sheriff, as he informed affiant, returned the execution; that he knew of no other property, real or personal, belonging to defendant to make the money due on the judgment; that, as he is informed and believes, John Gibbon is indebted to defendant—amount not known—and prays a writ of garnishment to issue.

“S. L. BRYAN.

“July 23d, 1878.”

Whereupon garnishee process issued against plaintiff in error, Gibbon. Interrogatories filed, and at the August term, 1877, Gibbon filed his answer in open court, and upon a hearing the court entered a judgment against Gibbon, in favor of defendant in error, for \$557.26 and cost.

The errors assigned are:

The court erred in rendering judgment for defendant in error, there being no return of the sheriff, no property found, and no affidavit sworn to by A. L. Bryan and filed.

2. The answer does not show that John Gibbon owed the note to Esther Aird.

3. The judgment should be in favor of Esther Aird for the use of S. L. Bryan, administrator of Wm. Aird, v. John Gibbon, garnishee.

4. The judgment should be for the full amount of the debt.

We regard the 3d error as well assigned. The Supreme Court have held that in garnishment the judgment should be in favor of the defendant in execution for the use of the plaintiff, against the garnishee. We have no doubt but this court would have a right to direct the Circuit Court to correct the judgment in form.

But a more serious and important question arises under the first error assigned. It does not appear from the record that the execution issued on the judgment, and upon which a levy was made, was returned "no property found," or that it ever was returned by the sheriff. Nor does it appear that what purports to be an affidavit of defendant in error was ever sworn to. Sec. 1 Chap. 62, Revised Statutes of 1874, provides "that when an execution shall be returned 'no property found,' on the affidavit of the plaintiff being filed with the clerk, etc., that defendant has no property within his knowledge liable to execution, and that he has just reason to believe that," etc. etc., then a summons may issue, etc., but before the summons issues there must be a return of execution "*nulla bona*," and an affidavit must be made by the plaintiff, or some one for him.

These two things must be done in order to give the court jurisdiction of the subject-matter of the suit. The issue and service of the summons gives jurisdiction of the person or party defendant. The plaintiff in error having answered in that suit, there is no question of the jurisdiction of the court over the person; but without a return of *nulla bona*, and without an affidavit by plaintiff, or some one for him, as directed by the statute, could the court acquire jurisdiction of the subject-matter?

While the Circuit Court is a court of general jurisdiction, and in the exercise of its common law powers is entitled to all the presumptions in favor of its jurisdiction, this presumption ceases when it undertakes to administer a statute passed in derogation of the common law, and the intendants are no

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stronger in its favor than courts of inferior jurisdiction. Smith's Leading Cases, 832; Denning v. Coreion, 11 Wend. 648.

Our Supreme Court, in Kruse v. Wilson, 79 Ill. 233, holds that in a proceeding by attachment the affidavit required by statute is what gives the court jurisdiction of the subject matter. "That it is the affidavit that starts the jurisdiction in motion, and that is jurisdiction." Why is it that the judicial power cannot be set in motion in attachment without an affidavit? It is because the statute requires an affidavit, and, being a statute in derogation of the common law, must in all things be substantially, if not strictly, complied with.

In garnishment two things are necessary to be done before the judicial power is set in motion. The execution must be returned "no property found," and plaintiff must file an affidavit setting up such facts as are required by the statute. Both are required to "set the judicial power in motion," which, according to the opinion *supra*, is jurisdiction. In that case a question was raised as to whether the plaintiff in attachment had been sworn to the affidavit. The Circuit Court admitted evidence upon the record to show that it had been sworn to, and that it was an omission of the clerk that no jurat appeared to the affidavit. The Supreme Court held that the evidence was properly admitted, and held that the fact that it was sworn to, gave the court jurisdiction.

In the case we are considering there is this difference: in the attachment nothing but an affidavit was required by the statute; the record showed one had been made. In this case, the law required, *first*, return of execution "no property found," *second*, an affidavit of plaintiff in judgment.

This record does not show a return of the execution, much less a return "no property found," nor does the record show that any affidavit was made by defendant in error, except in so far as they are shown by the recitals in the summons issued by the clerk; but we presume it will not be insisted by any one that these recitals are to be regarded as sufficient evidence of the return of execution and of the making the affidavit, in a case where the intendment is against rather than in favor of

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the jurisdiction of the court. Since the evidence fails to show a return of execution with the indorsement and the making of an affidavit, as required by statute, we believe the Circuit Court failed to acquire jurisdiction of the subject-matter.

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and Remanded.

ISAAC S. JONES

V.

GEORGE D. RAMSEY ET AL.

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86 640

1. **MORTGAGE—NOTES NOT DUE—SALE FOR DEFAULT IN INTEREST.**—A mortgage providing that "in case of default in the payment of the said note above mentioned, or any part thereof," that the trustee might advertise and sell the premises, and apply the proceeds, first to payment of expenses, second to the payment of amount due on said note, etc., does not make the whole sum due on default in payment of interest, and a trustee cannot, under such a power, sell and apply the proceeds on notes not due, nor can a court decree that mortgaged premises be sold subject to the lien of the unpaid balance.

2. **PARTIES IN INTEREST.**—Under such a mortgage, the assignee of the equity of redemption, though he may have assumed payment of the mortgage, has such an interest that he may object to a decree requiring him to pay the whole sum within thirty days. It is his right to pay off the indebtedness as it falls due, and he cannot be required to pay it except as stated in the deed.

3. **ENJOINING PROCEEDINGS AT LAW.**—Courts of chancery will not on a bill filed by the plaintiff in an action at law, enjoin the defendant therein from making his defense to such action at law, and yet allow the plaintiff to proceed. The plaintiff having elected his forum, should, if he discovers he has commenced in the wrong forum, abandon his action.

4. **FORECLOSURE IN CHANCERY—REDEMPTION.**—The statutes of the State existing at the time the mortgage was executed, entered into and became a part of the contract between the parties, and the statutory right of time to redeem in case of a foreclosure is a right in which the grantee of the mortgagor has an interest. So, where the mortgage is foreclosed by proceedings in court, such foreclosure must be in conformity with the statute, though the deed conferred power upon the trustee to sell; and the court had no authority to substitute another trustee in place of the one named by the parties, and order a sale within thirty days, without equity of redemption.

5. **FIXTURES—WHAT PASSES UNDER THE MORTGAGE—EXTRANEOUS PROOF.**—The court does not pass upon the question whether the machinery

Jones v. Ramsey et al.

in the mill on the mortgaged premises passes to the mortgagee, farther than to say that in this respect, the mortgage viewed in the light of the *status* of the property and the surrounding circumstances, must speak for itself as to what was included, and proof of a contemporaneous arrangement to change the legal effect of the mortgage is not admissible. The question as to whether certain articles are or are not fixtures, depends largely upon the intention of the party attaching them.

APPEAL from the Circuit Court of Clay county; the Hon. JOHN H. HALLEY, Judge, presiding.

MR. RUFUS COPE, for appellant; that a decree of sale for accrued interest only could be made, but the surplus cannot be retained, nor can the mortgaged premises be sold subject to the lien of the unpaid balance, cited *Hards v. Burton*, 79 Ill. 504.

The court erred in decreeing a sale of personal property not described in Ramsay's mortgage. The machinery in the mill is personal property: *Brown v. Lillie*, 6 Nev. 244; *Kirwin v. Latour*, 1 Harr. and J. 289; *Fullam v. Stearns*, 30 Vt. 443; *Gale v. Ward*, 14 Mass. 352; *Rogers v. Brokaw*, 25 N. J. Eq. 496; *Vanderpool v. Vanallen*, 10 Barb. 157; *Murdoch v. Harris*, 20 Barb. 409; *Pierce v. George*, 108 Mass. 78; *Hill v. Wentworth*, 28 Vt. 429; *Blanche v. Rogers*, 26 N. J. Eq. 563.

Being personal property, it could only be held by a chattel mortgage under the statute: *Murdock v. Gifford*, 18 N. Y. 28.

A supposition of the parties that the machinery was included in the mortgage, is a mistake of law and not remediable in equity: *Goltra v. Sanasack*, 53 Ill. 456.

MR. W. B. COOPER and MR. BEN. HAGLE, for appellees; contended that no party in appellate court can complain of an error not affecting his interest, and cited *Tibbs et al v. Allen*, 27 Ill. 119; *Clark v. Marfield*, 77 Ill. 258; *Van Valkenburg v. Trustees of Schools*, 66 Ill. 103; *Smith v. Hickman*, 68 Ill. 314; *Richards v. Greene*, 78 Ill. 525; *Hedges v. Mace*, 72 Ill. 472; *Fonville v. Sausser*, 73 Ill. 451.

The defendant in the replevin suit, though enjoined from defending, would have the right to contest the assessment of damages, the same as on a default: *Anderson et al v. Semple*,

2 Gilm, 455; C. & R. I. R. R. Co. v. Ward, 16 Ill. 522; Town of South Ottawa v. Foster, 20 Ill. 296; C. & St. L. R. R. Co. v. Holbrook, 72 Ill. 419; Chicago & Iowa R. R. Co. v. Baker, 73 Ill. 316.

As to what constitutes fixtures: Winslow v. Merchants Ins. Co. 4 Met. 306; First Parish in Sudbury v. Jones, 8 Cush. 187; Symonds v. Harris, 51 Me. 14; Laffin v. Griffith, 35 Barb. 58; Burnside v. Twitchell, 43 N. H. 390; Walmsley v. Milm, 7 C. B. (N. S.) 115; McCreary v. Osborne, 9 Cal. 119; Christian v. Dripps, 28 Penn. 271; Walker v. Sherman, 20 Wend. 636; Parson v. Copeland, 38 Me. 547; Baker v. Davis, 19 N. H. 325; Vorhis v. Freeman, 2 Watts & Serg. 116; Pyle v. Pennock, 2 Watts & Serg. 390; Harlan v. Harlan, 15 Penn. 507; McKenna v. Hammond, 3 Hill, 331; Bratton v. Clawson, 2 Strobb. 478; Snedecker v. Warning, 2 Kernan, 170; Despatch Line of Packets v. Bellamy M'f'g Co. 12 N. H. 205; Farrar v. Stackpole, 6 Greenl. 157; Full v. Walter, 28 Me. 545; Corliss v. McLayin, 29 Me. 115; Faris v. Walker, 1 Bailey, 541; Button v. Clawson, 2 Strobb. 478; Powell v. M. & B. M'f'g Co. 5 Mason, 467; Kirwan v. Latour, 1 Harr & J. 289; Gray v. Holdship, 17 Serg. & Rawle, 413; Morgan v. Athur, 3 Watts, 140; Lemar v. Miles, 4 Watts, 330; Walker v. Sherman, 20 Wend. 636; McDaniel v. Moody, 3 Stewart, 314.

BAKER, J. DAVIS, Adams and Pritchett owned a small parcel of land, upon which was standing a woolen mill containing a quantity of machinery of considerable value. The mill and machinery were also owned by them. In March, 1876, they executed and delivered to Ramsey a mortgage, with power of sale, upon the piece of land, describing it by metes and bounds. This mortgage was given to secure the payment of a promissory note for \$2,400, executed by them to Ramsey, bearing same date, and due in three years, with interest at the rate of ten per cent. per annum—interest payable semi-annually. Subsequently they executed to appellant, Jones, a second mortgage of a similar character, on the same property, to secure the sum of \$1,100. They failed to pay Ramsey the installments of interest due him in March and September of 1877, respectively.

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Ramsey had rented the mill from Davis & Co., in the spring, and had been running it, but afterwards the mill was closed, and Ramsey retained the key and advertised the mill and machinery for sale under his mortgage. On the 4th day of October, 1877, Jones surrendered to Davis & Co. the notes that were secured by said second mortgage, and they quit-claimed to him said land, and in their deed expressly conveyed the woolen factory thereon situated, with all the appurtenances, fixtures, machinery and implements of and belonging thereto, and then being therein. It seems that Davis & Co. had, when the mill was rented to Ramsey, retained a duplicate key to the mill, and this they delivered to Jones. Thereupon Jones, before the proposed day of sale under Ramsey's mortgage, entered the mill and removed therefrom a large portion of the machinery. Ramsey then replevied this machinery, and also filed the bill of complaint in the cause that is now before the court. The bill charged that nearly all of said machinery was affixed to the building, and that it was expressly understood that the said machinery and fixtures were included in and conveyed by the Ramsey mortgage, and that Jones agreed with Davis & Co., at the time that they executed the quit-claim deed, that he would assume the Ramsey debt and pay off his lien. The scope and prayer of the bill was to foreclose the equity of redemption, and that the premises, including said machinery, should be sold for the payment of the principal and interest in said note and mortgage, and that Jones might be enjoined from defending the replevin suit. Davis & Co. filed a cross-bill, charging that when they executed quit-claim deed Jones agreed to pay off the Ramsey note for \$2,400 and interest, but he had not paid it, and that he had fraudulently taken possession of the mill and moved out the machinery with the intention of not paying the Ramsey debt, and that the property left after the removal of the machinery was not sufficient to pay said debt. The cross-bill also charged that it was the understanding that the deed should be placed in the hands of a third party, and was not to take effect until Ramsey's debt was paid, and it also asked that Jones be enjoined from defending the replevin suit. Jones answered both bills, and claimed that the machinery

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was not included in the Ramsey mortgage; that he was entitled to it under his quit-claim deed, and that the only consideration for that deed was the debt due him, and denied that he agreed to pay the Ramsey debt.

On the hearing, the court found that it was agreed and understood that the machinery and fixtures were included in and conveyed by the mortgage to Ramsey; that Jones agreed to pay off the Ramsey mortgage; and had notice that said Davis & Co. intended, when they made the Ramsey mortgage, to convey said machinery by said mortgage to Ramsey; that Ramsey was in the possession of the premises on the 4th day of October, 1877; that Jones obtained the keys under false pretenses, and entered the building Oct. 12th, 1877, and carried away a large part of the machinery; that Ramsey replevied the same, and that replevin suit was pending; that the amount due on the Ramsey mortgage was \$2,680.00, and that the facts alleged in the original and cross-bills are true. The court decreed under the cross-bill that the defendant, Jones, be restrained from defending the replevin suit of Ramsay v. Jones, and decreed on the original bill that unless the \$2,680.00 be paid in thirty days, the master in chancery should act as trustee, and under the power of sale in the mortgage, sell said property without redemption, and make a deed to the purchaser.

The errors assigned are: that the court erred, (1) in finding the entire amount of the principal and interest of the debt of Davis & Co. to Ramsay, due, and in ordering sale of the property in question to pay the same; (2), in ordering that appellant Jones be enjoined from defending the replevin suit of Ramsey; (3), in decreeing a sale of the personal property not described in Ramsey's mortgage; and (4), in directing the master to sell under power in this mortgage, and in decreeing a sale without redemption.

Courts do not assume to make contracts for parties, but content themselves by enforcing such valid contracts as the parties themselves make. In the Ramsey mortgage the principal of the note secured was to be due three years after date, and the interest was payable semi-annually, and the mortgage provided that "in case of default in the payment of the said note above mentioned,

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or any parts thereof, according to the tenor and effect thereof," said Ramsey might advertise and sell said premises, and that he should apply the proceeds of sale, first to the payment of expenses, secondly "to the payment of the amount due on said note," rendering the overplus, if any, to the mortgagors or their assigns. This was the contract of the parties themselves. They might readily have provided that in case default was made in the payment of any installment of interest as it fell due, then that the principal debt should become due also; but they did not do this. A trustee cannot apply proceeds of sale on notes not due; nor can a court decree that the mortgaged premises be sold subject to the lien of the unpaid balance. *Gardner v. Diedrichs*, 41 Ill. 159; *Hards v. Burton*, 79 Ill. 504.

It is urged that appellant cannot take advantage of this error, for the reason that it does not affect his interests. The rule of law involved in this proposition is correct, but the facts of the case are not such as call for its application. Ramsey held the first mortgage, and Jones held a second mortgage, and thereupon the mortgagors quit-claimed to Jones the equity of redemption, and all the remaining interest of the mortgagors in the premises then became vested in Jones, and he either expressly assumed the payment of the Ramsey mortgage, or, at all events, took the premises subject to its lien. If the land should be sold under the decree, and the title vested in the master's vendee, what would become of the interest of Jones? Under his deed it is his right to pay off the several installments of interest as they fall due, and to pay off the principal debt of \$2,400 when it falls due, and thereby perfect his quit claim title. It may be, and probably is, of the utmost importance to him that he should only be required to pay as it is nominated in the bond. If the decree of the court had only been for the two installments of interest due, he might have been able to pay the \$240 and costs, and thereby have prevented a sale under the decree. And who knows but that a year hence he may be able to discharge the principal debt and remaining interest, and thereby save his estate and the loss of \$1,200?

It is further suggested that the court by its decree does not foreclose the mortgage but appoints its own officer to carry into

effect the trust created by the deed. The bill in its entire scope is a bill to foreclose the mortgage, and no facts are alleged therein calling upon the court to discharge the trustee that the parties themselves have appointed, and to substitute the appointee of the court in lieu of him. "The trust created by the deed" is, in the event of sale, "to pay the amount due on the note," but, by the decree, the court ascertains the whole amount of the principal and interest of the notes, whether due or not, and orders that, in case this sum of \$2,680 and costs of suit shall not be paid in 30 days, the Master shall, as trustee, sell the property by virtue of the power in the sale mortgage. Suppose that the trustee in the sale mortgage, default having been made in the payment of an installment of interest when due, had assumed to advertise the property for sale. If Jones, in such case, had paid, or tendered to him the interest then due, and all costs and expenses accrued, could he, under the powers in the mortgage, notwithstanding this, have rightfully and legally proceeded to sell the property in order to make or compel the payment of the principal debt which was not due? And yet, under this decree, Jones can only prevent a sale of the property by paying in full that which is not due as well as that which is due. Clearly, this is not carrying into effect the trust created by the deed.

We know of no case in which a court of chancery has ever assumed, on bill filed by the plaintiff in an action at law, to enjoin the defendant in the action from making defense to such action, and yet allowed the plaintiff to proceed with the action. It would seem that the plaintiff at law, having made choice of the forum in which to proceed against the defendant, should, if he discovers that he has commenced in the wrong forum, abandon his action and file his bill. If the articles of machinery were fixtures, and constituted a part of the realty as between mortgagor and mortgagee, then they passed by the first mortgage to Ramsey. In that case Ramsey, any time after the execution and delivery of the mortgage, might have maintained ejectment and recovered possession of the land and everything that was a part of the realty. A mortgagee has the right of immediate possession, and he is not required to show a

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breach of the condition or previous notice. Hilliard on Mortgages, 4th Edn. Vol. 1, 168. In this State the mortgagee is considered the owner of the fee as against the mortgagor, and all claiming under him, and is entitled to all the rights and remedies which the law gives to such an owner, and either before or after condition broken he can enter or bring ejectment. Carroll v. Ballance, 26 Ill. 9; Nelson v. Pinegar, 30 Ill. 480; Kilgour v. Gockley, 83 Ill. 109; Moore v. Fitman, 44 Ill. 367; Harper v. Ely, 70 Ill. 581. If a fixture or other part of the real estate be wrongfully detached from the freehold, the thing detached becomes the personal property of the owner of the soil, and he may, unless the land is held adversely, maintain replevin for the same. While the owner could not bring replevin for chattels severed from land in the adverse possession of the defendant, yet a landlord might thus proceed against his tenant, as the possession of the tenant is not adverse. Anderson v. Hapler, 34 Ill. 436. The possession of the grantee of the mortgagor is not hostile to or inconsistent with the right and title of the mortgagee, such grantee only succeeds to the right of the mortgagor and with notice of the incumbrance and his possession is not adverse to the mortgagee. Medley v. Elliott, 62 Ill. 532. If the machinery then constituted a part of the realty and was covered by the mortgage, Ramsey had an adequate remedy at law, and could introduce his evidence as to the character of the machinery and its attachments to the mill and all surrounding circumstances in the replevin suit.

So far as the alleged agreement of Jones to pay off the Ramsey mortgage is concerned, we would say that even assuming as sound law that Davis & Co., in the event that they were able to establish the fact that such agreement was actually made, and for a consideration, and that Jones was fraudulently attempting to defeat the claim of Ramsey in the replevin suit, and to remove and dispose of the fixtures, would be entitled to the injunction; yet no such case is made out by the proofs.

The deed contains no such provision. Davis testified that his understanding was that Jones would pay off the Ramsey debt. Pritchett testified that his understanding was that Jones would pay off the Ramsey mortgage; that he couldn't remember

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his words, but that he thinks that this was the meaning, and that when the deed was signed nothing was said about it. Adams testified that he had frequent talks with Jones about the Ramsey debt; that he could not state when or where, but that Jones had said that he would pay off the Ramsey debt. On the other hand, Vymonds, who took the acknowledgment to the deed, testified that nothing was said by any one of the parties about the Ramsey debt, and Jones testified that he had not at any time promised to pay off the Ramsey mortgage. What the witnesses Davis and Pritchett said as to what they thought and understood, is incompetent as evidence, and proves nothing; and the statement of Adams as to conversations that he could not locate either as to time or place, especially when we consider the surrounding circumstances, and that various propositions were mooted between them and rejected, is extremely unsatisfactory. In fact, the decided weight of the evidence is for the defendant on the question of this alleged agreement. The record is barren of any proof that the deed was intended to be an escrow.

We do not desire upon this record to express any opinion as to whether the machinery in question was personal property or a part of the realty. There will, in all probability, be a second trial of that issue, either in this case or in the action of replevin, and the evidence upon such trial may be more specific and satisfactory as to the character and surroundings of the property. We might remark, however, that it would be a violation of the rules of evidence to receive proof of a cotemporaneous verbal arrangement, to change the legal effect of the mortgage itself. *Smith v. Price*, 39 Ill. 28. The mortgage itself, viewed in the light of the *status* of the property and the surrounding circumstances, must speak for itself as to what it did or did not include. Were this a bill alleging a mistake of fact, as distinguished from a mistake of law, and seeking to reform the mortgage, then the rule might be otherwise.

We have been referred by counsel on either side to almost numberless and conflicting decisions upon the subject of fixtures. They are almost uniformly the decisions of the courts of other States, and upon this subject there appears to be an irreconcilable conflict of opinion.

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Judge Dillon in the Central Law Journal, of January 5, 1877, 22, says of the law of fixtures: "Whoever traces the history of the growth and development of the law on the subject, will see that the constant tendency of the judicial mind has been toward emphasizing the importance of intention, either actual, or as presumed from the character, relations and purposes of the property, as an element of controlling and frequently decisive importance."

In Ewell on Fixtures, on pages 21, 22, it is said: "The weight of modern authority and reason * * * * seems to establish the doctrine that the true criterion of an irremovable fixture consists in the united application of several tests:

"1st. Real or constructive annexation of the articles in question to the realty.

"2nd. Annexation or adaptation to the use or purpose of that part of the realty with which it is connected.

"3d. The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of annexation, and the purpose or use for which the annexation has been made.

"Of these three tests, the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others seem to derive their chief value as evidence of such intention."

In our own State, this question of intention has frequently been referred to in the decisions of the Supreme Court, in passing upon the question as to what was or was not a part of the realty.

In Dooley v. Crist, 25 Ill. 551, the court said: "If the intention was to render the improvement permanent when erected, there can be no question that it became a part of the freehold, and no subsequent change of intention changed its character to that of personal property."

In Smith v. Moore, 26 Ill. 392, the court said: "The true

reason why a purchaser, before the completion of the contract, has no authority to remove improvements which he may have placed upon the land, is not because he is a mortgagor, but because the law presumes they were annexed with the design of being permanent. The exception in favor of trade fixtures is made because the annexations are supposed to be accessory to the calling of the tenant, and not to the land; that they are made, not with the design of being permanent, but of being severed at the end of the term; whilst with the purchaser the presumption is that they are made with the design of their permanent engagement in connection with the land, and as an accessory to it. He makes them in view of their becoming his when he shall have acquired the absolute ownership of the land by conveyance."

In *Kelly v. Austin*, 46 Ill. 156, the Court said: "While the intention alone will not always determine whether such structures are, or are not to be regarded as personal estate, it will have a controlling influence in cases of doubt."

In *Arnold v. Crowder*, 81 Ill. 56, the Court said: "The matter of annexation is a relative question, which must receive a different answer as the parties differ in each case that arises. Much depends upon the intention with which the structure is made. * * * Perhaps the true rule is, that articles not otherwise attached to the land than by their own weight, are not to be considered as part of the land, unless the circumstances are such as to show that they were intended to be part of the land, the *onus* of showing they were so intended lying on those who assert that they have ceased to be chattels; and that, on the contrary, an article which is affixed to the land, even slightly, is to be considered as part of the land, unless the circumstances are such as to show that the article was intended all along to continue a chattel, the *onus* similarly lying on those who contend that it is a chattel. Intention is manifested by acts."

We have been thus elaborate upon this subject of intention, as we think that it may be of controlling influence as to some, if not all, of the property in question.

The right to redeem within twelve months after the day of

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sale, is a substantial or statutory right, and a right in which the grantee of the mortgagor has a lively interest. The statutes of Illinois in force when the mortgage deed was made, entered into the legal and equitable obligations of the contract witnessed by the deed, and if the mortgage is foreclosed by proceedings in court the foreclosure must be in conformity with such statute. When, in this case, the mortgagee asked the aid of the court of chancery, and prayed the court to take an account of the amount due upon the mortgage debt, and that the equity of redemption in said premises might be foreclosed, and that a decree might be made for the sale of the mortgaged premises, he was bound to know that the court could and would grant him relief only in conformity with the statute, and in accordance with principles that govern the courts of chancery. It matters not that no personal decree against any one for the amount ascertained to be due was entered, and it matters not that the master was directed to sell by virtue of the power in the sale mortgage. Notwithstanding this the decree was in substance and in fact a decree to foreclose the mortgage. The court found the amount due on the mortgage to be \$2,680, and ordered and decreed that if said amount should not be paid in 30 days, that the Master in Chancery of Clay county should sell said property, and that he should sell it according to law, and make a deed to the purchaser, and that there should be no redemption, and that the Master should pay to Jones any balance that the property might produce at said sale over and above said sum of \$2,680 and costs. It is true there was no express order that the equity of redemption would be foreclosed, but the orders that in default of payment by a certain day the Master should sell and execute a deed to the purchaser, and that there should be no redemption from the sale, not only effectually foreclosed the equity of redemption, but cut off the statutory right of redemption after sale. It is idle to say that such sale would be under the power in the mortgage, as the master would derive all his power from the decree, of the court. Where there is a mortgage and a court decree a sale under it, to culminate, mediately or immediately, in absolute legal and equitable title, then, regardless of the

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form of the mortgage, it is a foreclosure of the equity of redemption. The decree, the sale made under it and the deed, would constitute the transfer of title. The purchaser at such sale would derive title through the judicial proceedings in this cause. The decree of the court would be an essential element in the transfer of the title, and, under the statute, the court, when a mortgage is the lever with which it works the transfer, and the case is one not calling for a strict foreclosure, can only decree such transfer to be made as the statute directs it shall be made. The statutory right of redemption after sale is a rule of property. R. S. 1874, Chap. 77, §§ 16, 18; *Weiner v. Heintz*, 17 Ill. 259, 262; *Rhinehart v. Stevenson*, 23 Ill. 524; *D'Wolf v. Hayden*, 24 Ill. 525; *Farrell v. Parlier*, 50 Ill. 274; *Karnes v. Lloyd*, 52 Ill. 113; *Bronson v. Kinzie*, 1 Howard, 311; *Brine v. Hartford Fire Ins. Co.* S. C. U. S., opinion filed May 13, 1878.

For the reasons indicated in this opinion the decree herein is reversed and the cause remanded.

Reversed and remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—FEBRUARY TERM, 1879.

ADAMS EXPRESS COMPANY

V.

WILLIAM J. KING.

1. PLEADING—STATUTE OF LIMITATIONS.—A plea of the Statute of Limitations, in bar to an action on an unwritten contract, is sufficient if it alleges a lapse of ten years instead of five. The greater includes the lesser.

2. PLEADING—NON-RESIDENCE OF DEFENDANT.—It is not necessary to aver in the declaration, the non-residence of the defendant, and such averment is not traversable. Non-residence would become important only in case the Statute of Limitations should be pleaded, and then the better practice would be for plaintiff to reply specially the absence from the State, to defendant's plea.

3. DEMURRER—MATTERS OF FORM.—Questions relating to the form of a plea can be reached only by special demurrer.

4. CONTRACT OF CARRIER—CONDITIONS.—Suit was brought against an express company for a failure to carry safely a package of money. Defendant pleaded among other things a contract with a condition, setting it out. *Held*, that the proof would not sustain this averment if it appeared that the condition was not known or assented to by the plaintiff; that it was unnecessary to aver more than that it was the contract; if the condition was unknown and not accepted, it did not become a part of the contract.

ERROR to the County Court of Jackson county; the Hon. GEORGE W. ANDREWS, Judge, presiding.

Mr. E. C. DEVORE, for plaintiff in error; that the court
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could not strike out words from a plea because they were interlined, cited *Garrity v. Wilcox*, 83 Ill. 159.

A court can only amend its judgment as to matters of form at a subsequent term; *Smith v. Wilson*, 26 Ill. 186; *Cook v. Wood*, 24 Ill. 295; *Coughran v. Gutchens*, 18 Ill. 390.

There must be some memoranda by which to make the amendment: 11 Ill. 587; 20 Ill. 46; 18 Ill. 391; *Wallahan v. The People*, 40 Ill. 102; *Makepeace v. Lukens*, 23 Ind. 435.

A party is entitled to notice of proceedings to reinstate a case; 26 Ill. 187.

A receipt given by a common carrier must be taken all together in giving it construction: *Butler v. Steamer Arrow*, 6 McLean, 470.

Possession of a receipt containing conditions is *prima facie* evidence that the possessor assented to its conditions, and the burden is upon him to show that he did not assent: *Boorman v. Am. Ex. Co.* 21 Wis. 152; *King v. Woodbridge*, 34 Vt. 591; *Strohn et al. v. Detroit R. R. Co.* 21 Wis. 554.

As to the right of a carrier to restrict his liability: *Caldwell v. Southern Ex. Co.* 21 Wall. 264.

A receipt with conditions is the contract between the parties: *York County v. Central R. R. Co.* 3 Wall. 107; *Grace v. Adams*, 100 Mass. 505; *Kirkland v. Dinsmore*, 62 N. Y. 161.

Defendant's third plea, setting out the conditions of the contract, and failure of plaintiff to give notice of loss, was good, and the demurrer should have been overruled: *Adams' Ex. Co. v. Haynes*, 42 Ill. 89; *U. S. Ex. Co. v. Haines*, 48 Ill. 248; *U. S. Ex. Co. v. Haines*, 67 Ill. 137; *Anchor Line v. Dater*, 68 Ill. 369.

The declaration should have averred that claim was made for the loss within thirty days: *Southern Ex. Co. v. Caldwell*, 21 Wall. 264; *U. S. Ex. Co. v. Harris*, 51 Ind. 127.

Messrs. BARR & LEMMA, Mr. C. H. LAYMAN and Mr. GEO. W. HILL, for defendant in error; that the limitation laws in force at the time the cause of action accrues, govern, cited *Beesley v. Spencer*, 25 Ill. 216; Rev. Stat. 1874, 1,046.

The statute in force when the receipt in this case was given,

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allowed sixteen years in which to sue: *Scate's Comp.*, Laws of 1849, 752.

A foreign corporation cannot plead the Statute of Limitations: *Rev. Stat. Chap. 83, § 18*; *Tioga R. R. Co. v. Blossburg & Corning*, 20 Wall. 137; 50 N. Y. 656; 5 Nev. 44; *Ill. Cent. R. R. Co. v. Johnson*, 34 Ill. 389.

The third plea of defendant amounted to the general issue and was demurrable: *Ill. Cent. R. R. Co. v. Johnson*, 34 Ill. 389; *Zirkel v. Joliet Opera House Co.* 79 Ill. 834.

The plea should have alleged the conditions of the receipt: *Western Trans. Co. v. Newhall*, 24 Ill. 466; *Adams Ex. Co. v. Haynes*, 42 Ill. 89; *Ill. Cent. R. R. Co. v. Frankenberger*, 54 Ill. 88; *Anchor Line Co. v. Dater*, 68 Ill. 370; 2 *Parsons on Contracts*, § 238.

Demurrer cannot be carried back to the declaration after general issue pleaded: *Wear v. J. & S. R. R. Co.* 24 Ill. 593; *Chestnut v. Chestnut*, 77 Ill. 346.

As to power of the court to amend its records: *Bergen v. Riggs*, 40 Ill. 61; *Dunham v. South Park Commissioners*, 10 *Chicago Legal News*, 74.

WALL, J. This was an action of assumpsit, by the defendant in error against the plaintiff in error. The amended declaration, filed at the January term, 1878, contained three counts: the first alleging that the plaintiff in error, on the 19th August, 1864, undertook to carry a valuable package from D. E. Bluff, Arkansas, and deliver it for plaintiff to James Brown, at Liberty, Illinois; and that the package was not so delivered, etc. The second count is in substance the same as the first, and the third is a common count for goods, wares and merchandise, etc. None of these undertakings were alleged to be in writing, but attached to the declaration was a copy of an express receipt for a package said to contain \$170.00, dated D. E. Bluff, Aug. 19, 1864, with certain conditions not set out in either count.

The pleas filed were: 1st, non assumpsit; 2nd, Statute of Limitations, 10 years; 3d, that the supposed causes of action in the 1st, 2nd and 3d counts were for the same thing, to wit: a supposed failure to deliver the package in question; that by the

terms of the contract the defendant was not to be liable for loss unless the claim was made in writing at the office of defendant in D. E. Bluff within thirty days from the date of the receipt, with the receipt or contract attached; that no such claim was presented within thirty days, nor within a reasonable time, nor at any time within thirteen years, etc. The court, on motion of the plaintiff, struck the 2d plea from the files, and sustained a general demurrer to the 3d plea. The 2d plea was properly entitled of the cause, and as to the 3d count, was good. It was good as to the 1st and 2nd counts, unless it can be said that they are upon a written instrument—but these counts do not in terms declare upon a written instrument. To all the counts the plea would have been good if it had averred the lapse of five years only. The greater includes the lesser, and it would seem to be no serious objection that it alleged ten years instead of five. It is urged that defendant is a foreign corporation, and could not avail of the Statute of Limitations. The declaration avers that defendant is, and was since the cause of action accrued, resident in New York, but it does not aver that defendant is a corporation. *Wallace v. The People*, 63 Ill. 451. The averment of non-residence in the declaration is not necessary and not traversable. The plaintiff, to recover, is not bound to prove the fact in the first instance. It could become important only in case the statute should be plead as a defense. The regular course of pleading was for defendant to set up the bar by plea, and for plaintiff to reply specially the absence from the jurisdiction. It was error to strike this plea from the files. The 3d plea was inartificially drawn, and was obnoxious to a special demurrer, for several reasons, assigned in the brief, but these objections could not be reached by general demurrer. We think it is good in substance. It is urged that this plea was interlined after filing, and that as originally drawn it was wholly insufficient. Since the record was filed in this court the court below on motion of plaintiff, struck out the words so interlined. Affidavit is made in this court by counsel who wrote the plea that the interlineations were made before it was filed, and the original has been sent here for inspection. We have examined it, and are unable to say from its appearance that the interline-

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ations were made subsequent to the filing of the plea. They seem to be in the same handwriting and ink as the body of the plea, and this is consistent with the affidavit. However, we think the matters interlined are not essential. Without them the plea alleges that the contract contained the condition in question, and that this was a part of the agreement. The proof would not sustain this averment if it appeared that this condition was not known or assented to by the plaintiff; but it is unnecessary to aver in the plea more than that it was the contract. If the conditions were unknown and not accepted, they did not become a part of the contract. For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN B. KIMBALL

V.

CITIZENS' SAVINGS BANK.

REPLEVIN—JUDGMENT FOR RETURN OF PROPERTY.—To the declaration in replevin defendant pleaded *non cepit, non detinet*, property in another; that the property was held under certain writs of attachment and execution; and former adjudication. The plaintiff filed a demurrer to the third, fourth and last pleas, which was overruled, and electing to stand by his demurrer, the court rendered judgment against plaintiff for costs. *Held*, that under the state of the pleadings, it was the duty of the court to render final judgment against the plaintiff, and for a return of the property.

ERROR to the Circuit Court of Jackson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

MESSRS. SMITH & STEPHENS and Mr. LUCIEN EATON, for plaintiff in error; that judgment should have been for return of the property, cited Rev. Stat. 1874, 853, § 22; *King v. Ramsey*, 13 Ill. 619; *Underwood v. White*, 45 Ill. 437.

Electing to stand by a demurrer is an admission of record of the allegations, equivalent to a finding by a jury: *Nispel v. Laparle*, 74 Ill. 306.

A failure to except to the judgment in the court below is not a waiver of the error: *Richeson v. Ryan*, 14 Ill. 74; *Thayer et al. v. Finley et al.* 36 Ill. 264; *Kern v. Zink*, 55 Ill. 449; *Stuart v. The People*, 3 Scam. 395; *Sloo v. State Bank*, 1 Scam. 428.

Messrs. DONOVAN & CONROY, for defendant in error; that the court had a right to try all the issues in the case, cited *Campbell v. Head*, 13 Ill. 122; *Butler v. Mehrling*, 15 Ill. 488; *Hopkins v. Ladd*, 35 Ill. 178.

No motion for a new trial was made and no exception taken, and this court cannot inquire into the finding of the court below: *Lawson v. Langhaus*, 85 Ill. 138; *Nimmo v. Kuykendall*, 85 Ill. 476; *Reichwald v. Gaylord et al.* 73 Ill. 503; *Choate v. Hathaway*, 73 Ill. 518; *Bills v. Stanton*, 69 Ill. 51; *Law v. Fletcher*, 84 Ill. 45; *Boyle v. Levings*, 28 Ill. 314; *Pottle v. McWorter*, 13 Ill. 454; *St. L. A. & T. H. R. R. Co. v. Dorsey*, 68 Ill. 326; *Culver v. Hide and Leather Bank*, 78 Ill. 625; *Gardner et al. v. Russell*, 78 Ill. 292; *Parsons v. Evans*, 17 Ill. 238; *Force M'fg Co. v. Horton et al.* 74 Ill. 310; *People v. Green*, 54 Ill. 280; *Prout et al. v. Grout et al.* 72 Ill. 456; *McPherson v. Nelson*, 44 Ill. 124; *Kern v. Strasberger*, 71 Ill. 303.

TANNER, P. J. In this case the defendants in error sued out a writ of replevin in the Circuit Court of Jackson county, Illinois, for one hundred and thirty tons of pig iron, then in the hands of plaintiff in error. The writ was duly executed and the property delivered to the defendant in error. The declaration contains two counts: one for the unlawful taking, the other for the unlawful detaining of the above described property. To this declaration, plaintiff in error filed four pleas, viz: 1. *Non cepit*. 2. *Non detinet*. 3. That the Big Muddy Iron Company was owner of the property described in the declaration. 4. That said property was held under certain writs of attachment and special executions, fully set forth in the record. Demurrers were filed to the third and fourth pleas, and were overruled, and leave granted defendant in error to reply. The plaintiff

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in error, by leave, then filed a plea of former adjudication. To this last plea a demurrer was filed by defendant in error and overruled by the court. The defendant in error declined to plead further in the cause, and thereupon judgment was rendered in the following words: "It is considered and adjudged by the court that said plaintiff take nothing by his suit, and that the defendant go thereof without day, and that the defendant do recover against the plaintiff his costs and charges by him about his defense, in this behalf expended, to be taxed herein, and that he have execution therefor." The plaintiff in error brings the case to this court, and alleges that the court erred in not rendering judgment for the return of the property.

On the state of pleadings presented by the record, the court should have awarded a return of the property. The defendant in error in the first place filed a general demurrer to the 3d and 4th pleas; the demurrer was overruled, and leave was given to reply, but no replication was filed. The record, however, stood open in this respect down to the time the defendant in error filed his 5th plea. The court overruled a demurrer to this plea, as well as to the 3d and 4th pleas. The defendant in error then announced that he would "stand by his demurrer to the pleas, and that he did not wish to plead further." At this point he had not taken issue upon any of the pleas. By the demurrer the facts set out in the 3d, 4th and 5th pleas were admitted to be true, and the court in overruling the demurrer, declared the law to be with the plaintiff in error. When the defendant announced that he stood by the demurrer, and did not wish to plead further, he declined to take issue on any of the pleas interposed to the action. It was then the duty of the court, if any of the pleas presented a complete bar to the action, to enter final judgment for the plaintiff in error. *Bissell v. City of Kankakee*, 64 Ill. 249; *Smith v. Dysart* 12 Ill. 458; *Dana v. Bryant*, Geo. 104.

We have carefully looked into the several pleas to which demurrers were sustained, and have no hesitation in holding that the court was required to enter final judgment for the plaintiff in error. The statute provides that: "If the plaintiff in an action of replevin fails to prosecute his suit with effect, or

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suffers a nonsuit or discontinuance; or if the right of property is adjudged against him, judgment shall be given for the return of the property, and damages for the use thereof from the time it was taken until the return thereof shall be made, unless the plaintiff shall, in the meantime, have become entitled to the possession of the property, when judgment shall be given against him for costs and such damages as the defendant shall have sustained; or if the property was held for the payment of any money, the judgment may be in the alternative that the plaintiff pay the amount for which the same was rightfully held with proper damages, within a given time, or make return of the property." Rev. Stat. 1874, 853, § 22.

Under this statute and the state of the pleadings, the Circuit Court should have awarded a writ of *retorno habendo*. For this omission the judgment will be reversed and the cause remanded with leave to the plaintiff in error to move the court for a judgment upon the record in accordance with the foregoing views.

Reversed.

D. S. MORGAN & CO.

v.

JAMES THETFORD.

CONTRACT OF SALE—RESCISSION.—A party seeking to rescind a contract for the sale of a machine, on the ground that it did not work as warranted, must return or offer to return it within a reasonable time after he discovers its defects. He cannot use the machine through the whole season, lay it aside, and then defeat a recovery of the contract price on the ground that it did not work well.

ERROR to the Circuit Court of Jackson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

MESSRS. BARR & LEMMA, for plaintiffs in error; that a party seeking to rescind a contract must place the opposite party *in statu quo*, cited *Buchanan v. Harney*, 12 Ill. 336; *Smith v. Doty*, 24 Ill. 165.

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He cannot keep the goods an unreasonable length of time: Story on Sales, § 426.

The machine not being returned, the vendor was entitled to recover its reasonable value, notwithstanding the warranty: Owens v. Sturges et al. 67 Ill. 366.

If the defect was unimportant, or could easily have been remedied, the defendant is still liable: Morgan v. Collins, 19 Ill. 126.

Mr. WILLIAM J. ALLEN, for defendant in error; that the contract might be rescinded, cited 2 Chitty on Contracts, 1089; Addison on Contracts, 504.

ALLEN, J. This suit was brought by plaintiff on a promissory note executed by defendant to plaintiff, for a reaper and mower combined. Defendant sets up by way of bar to a recovery on the note, a warranty and failure of the conditions of the warranty. A trial was had in the Jackson Circuit Court, before a jury; verdict for defendant. A motion for a new trial was made by plaintiff, which the court overruled, and rendered a judgment against plaintiff for costs. Among other errors assigned on the record, is the refusal of the court to grant a new trial. The evidence discloses the fact that the reaper cut well, but that the rake worked badly. That after the plaintiff's agent had been notified, he re-adjusted the rake, and after cutting about half an acre the defendant seemed to be satisfied, and executed the note sued on, and paid \$5 in money to pay freight on the machine. That defendant continued to use the reaper until he completed his harvest, and that afterwards he notified plaintiff's agent that the machine did not work well. The only complaint seemed to be that the rake did not properly rake off the grain. If the defendant desired to rescind the contract, it was his duty to return or offer to return the machine, within a reasonable time after he discovered its defects; in this way he might have exonerated himself from the payment of his note, having done all he could do or was required to do to place the plaintiff *in statu quo*. Buchanan v. Harney, 12 Ill. 336; Smith v. Doty, 24 Ill. 163; Story on

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Sales, § 426. Defendant having failed to return or offer to return the reaper, the contract price, or if there was a partial failure of consideration to pay, he became liable to pay plaintiff whatever the reaper was worth. The expense of repairing and adjusting the rake, or even procuring a new one, or new attachments to work the rake, would be small compared with the value of the reaper itself, if it cut well (and the evidence shows that it did). As a mower the evidence shows its value at from \$75 to \$125, and although the defendant says he never received the mowing attachment, yet he fails to show that he ever called for it, or that it would not have been furnished if demanded. So that in any light in which we can view this testimony, the plaintiff was entitled to recover something. Defendant could not use the reaper through his harvest, lay it aside and say it did not work well, and I will neither return it or pay anything for it.

Neither the terms of the warranty or the law of the land would permit him to do this. We repeat, he must in a reasonable time return or offer to return the reaper, or hold himself responsible for the contract price or its value, whatever that may be. The evidence shows its value as a mower alone to be greatly beyond what defendant advanced for payment of the freight upon it. Under the evidence the verdict should have been for plaintiff for the contract price or the value of the property, and the court erred in refusing to set aside the verdict of the jury and to grant a new trial.

Judgment of the Circuit Court reversed and cause remanded.

Reversed and remanded.

Rabberman v. Muehlhausen.

FREDERICK RABBERMAN

v.

BERNHARD W. MUEHLHAUSEN.

1. **PROMISSORY NOTE—TRANSFER.**—A promissory note payable to A. or bearer cannot be transferred, by mere delivery, so as to vest the legal title in the holder or bearer.

2. **DEFENSES.**—Where suit is brought upon such a note, by a person not the payee, and who becomes the owner thereof without its having been assigned, the maker can present his defense to the same extent that he could if suit was brought by the payee.

APPEAL from the Circuit Court of St. Clair county; the Hon. AMOS WATTS, Judge, presiding.

Mr. R. A. HALBERT and Mr. C. F. NOETLING, for appellant; upon the question of fraud in procuring the note signed, cited *Champion v. Ulmer*, 70 Ill. 322; *Edleman v. Byers*, 75 Ill. 367; *Byers v. Daugherty*, 40 Ind. 198; *Gibbs v. Linabury*, 22 Mich. 479; *Briggs v. Ewart*, 51 Mo. 245; *Hubbard v. Rankin*, 71 Ill. 129; *Detmiller v. Bish*, 44 Ind. 70.

If a part of the instrument signed is afterwards torn off or erased, the maker is not bound by the instrument so altered: *Wait v. Pomeroy*, 20 Mich. 425; *Kellogg v. Steiner*, 29 Wis. 626; *Cochran v. Nebecker*, 48 Ind. 459; *Bendict v. Cowden*, 49 N. Y. 396.

An instrument signed by an illiterate person under misrepresentation, as to its contents; or where the instrument is misread to him, is void: *Schuykill Co. v. Copley*, 67 Pa. St. 387; *Walker v. Ebert*, 29 Wis. 194; *Richardson v. Schirtz*, 59 Ill. 313; *Leach v. Nichols*, 57 Ill. 273; *Munson v. Nichols*, 62 Ill. 111; *Latham v. Smith*, 45 Ill. 25; *Taylor v. Atchison*, 54 Ill. 196; *Sims v. Bice*, 67 Ill. 88; *Champion v. Ulmer*, 70 Ill. 322; *Edleman v. Byers*, 75 Ill. 367.

Appellant was only required to use reasonable caution in signing the note; *Taylor v. Atchison*, 54 Ill. 196; *Sims v. Bice*, 67 Ill. 88; *Gould v. Stevens*, 43 Vt. 125; *Ayers v. Hutchins*, 4 Mass. 370; *Russell v. Haddock*, 3 Gilm. 233.

An instruction assuming to be a statement of the case, must state all facts necessary to be proved: *St. L. & S. E. R'y Co. v. Britz*, 72 Ill. 256.

Where it is manifest the verdict is wrong, and that improper instructions may have contributed to the result, a new trial should be granted: *T. W. & W. R. R. Co. v. Corn*, 71 Ill. 493; *T. W. & W. R. R. Co. v. Moore*, 77 Ill. 217; *C. B. & Q. R. R. Co. v. Van Patten*, 74 Ill. 91.

No assignment of the note to appellee was proven: *Elliott v. Levings*, 54 Ill. 213.

A person taking a note without assignment, takes it subject to all the defenses available against the payee: *Sturges v. Miller*, 80 Ill. 241.

Evidence of other fraudulent transactions of the same character, by the payee of the note, should be admitted: *Hall v. Taylor*, 18 N. Y. 589; 76 Ill. 230.

Messrs. WILDERMAN & HAMILL, for appellee; that the exercise of due diligence on the part of the signer of negotiable paper, is necessary, cited *Homes v. Hale*, 71 Ill. 552; *Swannell v. Watson*, 71 Ill. 456; *Sims v. Bice*, 67 Ill. 88; *Mead v. Munson*, 60 Ill. 49; *Leach v. Nichols*, 57 Ill. 273; *Taylor v. Atchison*, 54 Ill. 196; *Yocum v. Smith*, 63 Ill. 321; *Harvey v. Smith*, 55 Ill. 224; *Comstock v. Hannah*, 76 Ill. 530.

Appellant is liable if he knowingly signed a note with a condition annexed, even if the condition was detached after its execution, the note being in the hands of an innocent holder: *Elliott v. Levings*, 54 Ill. 213; *Clarke v. Johnson*, 54 Ill. 296; *Shipley v. Carroll*, 45 Ill. 285; *Harvey v. Smith*, 55 Ill. 224.

Instructions calculated to mislead the jury should be refused: *St. L. & S. E. R. R. Co. v. Britz*, 72 Ill. 256.

The instrument being payable to bearer, did not require indorsement: *Rev. Stat. 1874, Chap. 98, § 8*; 2 *Parsons on Notes and Bills*, 33; 1 *Parsons on Contracts*, 24; *Mercer County v. Hackett*, 1 Wall. 95; *E. & H. R. R. Co. v. Hunt*, 20 Ind. 467; *Jones v. Nellis*, 41 Ill. 482; *Miller v. Race*, 1 *Smith's Lead. Cas.* 250; *Binz v. Weber*, 81 Ill. 288; *Johnson v. County of Stark*, 24 Ill. 85; *Town of Eagle v. Kohn*, 84 Ill. 295.

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TANNER, P. J. This was an action of assumpsit, instituted by the appellee upon a promissory note, executed by the appellant, and payable to one O. P. Baker, or bearer. The general issue was filed and several special pleas. The second plea avers "that the maker of the note was unable to read writing in the language in which the note was written; and that in signing the said note, he was told and induced to believe that he was executing a contract entered into between him and the payee of the note, for the purchase of lightning rods, and the paying therefor by feeding and taking care of a certain number of horses, then owned by the payee of the note." The third special plea avers that "the payee in the note represented that he was the conductor of a lightning rod company, which owned a large number of horses; and he then proposed to appellant to give him the sum of seven dollars per head for the feeding and taking care of thirty horses per month, and to continue to do so for five months; that he accepted this proposition, whereupon the payee in the said note proposed to put up lightning rods to appellant's dwelling house and barn, and to apply the cost thereof to the payment in part for the keeping and feeding of said thirty head of horses. To this proposition he also assented; and that the said Baker, the payee in the said note, then put up the lightning rods at the price of one hundred and seventy dollars. And thereupon the said Baker drew up and presented to him a paper, partly printed and partly written, in the English language; and that he could neither read nor write the said language. That said Baker read and represented said instrument to be a promissory note, conditioned for the payment of money, but to be paid wholly in keeping and feeding of horses, as aforesaid; and it was not to become due and payable until the amount thereof was discharged in the feeding and keeping of said horses. And that he, in full confidence in the truth of the statements so made, signed the said instrument, and thereby he was fraudulently induced to sign the same." Issue was joined on the several pleas, and the cause was submitted to a jury, and verdict returned for the appellee.

A motion for a new trial was overruled, and judgment was rendered upon the verdict. The appellant brings the cause

to this court, and assigns as error, first, the giving of the first and second instructions for the plaintiff below. We think both instructions should have been refused. In the first instruction the jury are directed to find for the plaintiff if they believe, from the evidence, the defendant knew at the time he was signing the contract spoken of by him, that there was a note attached to it, and that the agreement spoken of by defendant in his evidence was that the note attached to it was to be paid by horse-feed; and that the plaintiff purchased the note for value before it was due, without notice, actual or constructive, of any defense to the note." The fault in this instruction consists in not having any testimony upon which it can rest. The appellant is the only witness that testifies in reference to the contract, and he does not at any time state that he signed a contract with a note attached to it, but that he signed a contract or note which was conditioned to be paid in feeding and taking care of horses; that he was sure he never signed such a paper as the note sued on; that the paper he signed was twice as large as the note. There is another reason why these instructions should have been refused. The note is payable to O. P. Baker or bearer, and was passed to the appellee by delivery. Under Sec. 4, Chap. 98, R. S. 1874, promissory notes must be indorsed thereon under the hand of the payee, in order to vest the right of property absolutely in the assignee. And where suit is brought upon a promissory note by a person not the payee, and who becomes the owner thereof without its having been assigned, the maker can present his defense to the same extent that he could in case it was brought by the payee. Both instructions are based upon the theory that if the appellee purchased the notes before maturity, without notice of any defense to the same, he stands in the position of an innocent holder. The rule of law is otherwise. *Sturges v. Miller*, 80 Ill. 241.

We are asked, also, to reverse the judgment, upon the authority of the case of *Elliott v. Levings & Co.* 54 Ill. 213. In that case the court says: "There is however a defect in the proof, for which the judgment must be reversed. The bill of exceptions, which professes to contain all the evidence, sets out the note, but shows no assignment of it by the payee to the

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plaintiff, and the counsel for the appellant ask a reversal on this ground."

It is so in the case before us; and the judgment, if there was no other error, would have to be reversed for this. But the counsel for the appellee urges that the rule laid down in this case has been changed by the 8th section of chap. 98, R. S. 1874. This section was enacted in 1874, and went into force on the 1st day of July of that year, and so far as we are now informed, has in nowise been construed by the courts. The note in the case before us, as has already been observed, is made payable to "O. P. Baker or bearer." In *Hilborn v. Artus*, 3 Scam. 344; and *Roosa v. Crist*, 17 Ill. 450, it is held that a note payable to A. B. or bearer, cannot be transferred by mere delivery, so as to vest the legal title in the holder or bearer. These cases are familiar to the bar, and we need make no quotations therefrom, in order to show the grounds upon which they rest. It is sufficient to say, such is the law. The note in suit before us has a definite payee. The term bearer is mere surplusage; and being made payable to a person by name, the title can only pass from him by his indorsement, in pursuance of the provisions of the statute in reference to this character of paper. To apply the rule for which the counsel for the appellee contends, in the case now under consideration, we would have to reverse the order of reasoning adopted by the Supreme Court, as the basis for rule in the cases before cited upon this point. The payee would be entirely ignored—his name regarded as mere surplusage. This view is not supported by reason or authority. To hold that by the 8th Sec. of the Chap. on negotiable instruments, the legal title to this note passed to the appellee by mere delivery, would be assuming that the 4th Sec. of said Chap. has been repealed by implication. The doctrine of the repeal of existing statutes by implication is not favored, and is never applied where statutes are *in pari materia*, except where there is an irreconcilable repugnancy. This rule is without exception and too well understood to demand, the citation of authority.

These several provisions of the statute are not repugnant, and we hold that section 8 does not in the least affect the provisions

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of section 4, as construed by our court, in the cases to which we have already referred. Section 4 was re-enacted by the General Assembly in 1874 without alteration, and long after it had been repeatedly construed by our Supreme Court, and its re-enactment must be presumed to have been done with the intention of continuing it in force, as construed by the courts. Other errors are assigned, but as they are of such character as would likely be corrected if another trial was had, it is unnecessary to notice them.

For the errors already indicated, the judgment must be reversed and the cause remanded.

Reversed and remanded.

ASA D. HARPER ET AL.

v.

THE TOWN OF DODDS.

1. HIGHWAY—DEDICATION—NOT INFERRED FROM USE.—In this State, no inference or conclusion will be drawn against the owner of unenclosed land, which is traveled, to establish an easement in the public. The voluntary use of a way by the public, with the assent of the owner, is not of itself sufficient to make it a public highway; but such use and assent, in connection with proof of actual recognition and repair by the public authorities, may warrant a jury in finding that the way is a public highway.

2. HIGHWAY BY PRESCRIPTION.—The mere fact that people may have traveled over the way in question, and that it may have been denominated a public highway, does not make it such, even though such travel may have been permitted without objection for more than twenty years. So, where the way in question was but a short piece of road, having no connection with prominent points, was used only by a neighborhood, and had never in any way been regarded by the public authorities as a public highway, it cannot be considered as a public highway in the legal sense of the term.

APPEAL from the Circuit Court of Jefferson county; the
HON. MONROE C. CRAWFORD, Judge, presiding.

Messrs. CASEY & LAIRD, for appellants; contending that the description of the road as set forth in the complaint must be proved, cited *Martin v. The People*, 23 Ill. 395.

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The existence of the road at the point named must be proved: *Houston et al. v. The People*, 63 Ill. 185; *Town of Lewiston v. Proctor*, 27 Ill. 414.

No inference exists against the owner of unenclosed land to establish an easement in favor of the public: *Warren v. The President, etc.*, 15 Ill. 236; *Kyle v. Town of Logan*, Sup. Ct. Ill. 1878.

Occupation, without an acceptance by the public, will not create an easement: *State v. McDaniel*, 8 Jones, 284.

Voluntary use by the public with the assent of the owner of the soil, is not of itself sufficient to make a public highway: *Alvord v. Ashley*, 17 Ill. 363.

There must be an acceptance by the public: *Martin v. The People*, 23 Ill. 395; *Town of Lewiston v. Proctor*, 27 Ill. 414; *Green et al. v. Oakes*, 17 Ill. 249; *White v. Bradley*, 66 Me. 254.

To establish a highway by prescription, the use must be open, adverse and under a claim of right: *Gentleman v. Soule*, 32 Ill. 271; *State v. Joyce*, 19 Wis. 92; *Kilburn v. Adams*, 7 Met. 33; *Yute v. Bradbury*, 40 Me. 159.

It is better, when there is doubt about the existence of a highway, to lay out the road anew and condemn the right of way, that vexatious litigation may be avoided: *McIntyre v. Storey*, 80 Ill. 127; *Davis v. Rumsey*, 5 Jones 240.

Messrs. POLLOCK & SON and GREEN & CARPENTER, for appellee; in favor of a prescriptive right in the highway, cited *Town of Lewiston v. Proctor*, 27 Ill. 414; *Onstott v. Murray et al.* 22 Iowa, 457; *Worrall v. Rhoads*, 2 Whar. 437; *Hart v. Trustees of Bloomfield*, 15 Ind. 226; *State v. Hill*, 10 Ind. 219.

The intention of a party to dedicate may be manifested by express consent or acquiescence in the use: *Warren v. President, etc.* 15 Ill. 236; *Smith et al. v. Town of Flora et al.* 64 Ill. 93; *Marcy v. Taylor*, 19 Ill. 634; *State v. Hill*, 10 Ind. 219; *Cincinnati v. Lessee of White*, 6 Pet. 431; *Com'rs of Highways v. Glass*, 19 Barb. 179; *Chicago et al. v. Wright*, 69 Ill. 318; *Angell on Highways*, § 137; 7 Met. 33.

A new trial will not be awarded where the evidence tends to sustain the verdict, or where it is conflicting, unless clearly

against the weight of evidence: *Wiggins Ferry Co. v. Higgins*, 72 Ill. 517; *Gilbert v. Bone*, 79 Ill. 341; *Varner v. Varner*, 69 Ill. 445; *Kightlinger v. Egan*, 75 Ill. 141; *T. W. & W. R. R. Co. v. Moore*, 77 Ill. 217.

ALLEN, J. This was a suit instituted by appellee against appellants, before a justice of the peace, on a charge against appellants of having obstructed a "public highway." An appeal was taken to the Circuit Court, and upon a trial in that court appellants were found guilty. A motion for new trial was overruled, and judgment on the verdict for \$300 and cost against each of the appellants, and the cause is brought to this court by appeal.

The controversy turns upon the question as to whether the road where the obstruction was placed, was a public highway within the meaning of that term—such a road as gave to the public an unconditioned right to use, independent of the will of the owner in fee of the land over which it passed. It is claimed by appellee that the public have such right by prescription or user, and this is denied by appellants. It is claimed by appellee that the place obstructed was on a line of travel by the public in going to and from the towns of Mt. Vernon, in Jefferson county, and Benton, in Franklin county; but the evidence shows that as a line of travel between these two points it has long since been abandoned, if ever so used. That at one time there was a mill in the vicinity of which this obstruction is charged to have been made, but that the mill was abandoned many years since, and for that purpose it ceased to be used, and that for several years it has only been used by neighbors in passing to a church or school-house, and a graveyard in the vicinity, and as an outlet to a public road leading east and west, near the church, and near the place where this obstruction was placed.

It is further shown by the evidence that about nine years since, on the petition of a number of citizens living along a line from Benton to Mt. Vernon, the county authorized the survey and location of a road leading from Mt. Vernon south, in the direction of Benton, over the very line of travel now claimed

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as a public highway, and that said line was surveyed and the line established, and the road ordered to be opened; but that, upon a remonstrance of a still greater number of citizens along the line, the county authorities set aside the order and vacated the line, and neither in the petition to establish a road, nor in the petition for the vacation of the line, is any mention made of a public highway existing on this or any other portion of the route. The evidence shows that the short line claimed to be a public highway, has for a number of years been in bad condition, obstructed by brush, limbs and fallen timber, washes and ruts; so as to make it difficult, if not dangerous, to pass over with loaded wagons. The road has never been recognized by the public road authorities, or any of the road labor of the district performed on it; that the little work that was ever done on it to make it passable was done by individuals on their own account, and not for the public convenience. That this short line of travel was always through an open wood; that the ground to the margin of the line of travel had never been enclosed until fenced by the owner, which is the obstruction complained of. One witness testifies that he ordered the road worked at one time while supervisor, but there is no evidence that work was ever done on it; he says he was ordered to do so while supervisor, eight or nine years ago. It is probable that the order to work was the order to open the road by the county authorities, which was afterward revoked by them. The evidence shows that slight changes in the line of travel were made from time to time, as obstructions might render necessary. The evidence shows that travel is and has been for years obstructed by fencing, but for a short distance both north and south of this obstructed part. We think this evidence falls far short of showing that this was a public highway, in the sense in which that term is used in the statute.

It cannot be claimed that this is a dedication by the owner of the land to the public for a highway. "For no inference or conclusion will be drawn in this State against the owner of land lying unenclosed, which is traveled, to establish an easement in the public." *Warren v. President and Trustee*, 15 Ill. 236. The voluntary use of a way by the public, with the

assent of the owner of the soil, is not of itself sufficient to make it a public highway, and impose upon the proper public authorities the duty of repair. But when these are connected with proof of its actual recognition and repair by the proper public authorities, the whole facts should go to the jury, from which they might be warranted in finding from such use by the public, acquiescence by the owner and recognition and repair by the proper public authorities, "that the way is a public highway in the full sense of that term." *Alvord v. Ashley*, 17 Ill. 369.

It is manifest that if this be a public highway it has become so by prescription or user. The mere fact that people may have traveled over it and that it may sometimes have been denominated a highway, do not make it such, though such travel may have been permitted without objection for over twenty years. What is there in this record, then, that contradicts the idea that this is a public highway? First, it is but a short piece of road, and only used by neighbors in going to mill when it led to a mill, which ceased to exist many years ago, and in going to a church that stands or that stood on a public highway, or to a graveyard in the vicinity of the church. It started from no town or village and public place, and led to none. Its existence as a public highway was not recognized in an attempt to establish a highway over the very ground upon which it is claimed to exist, either by those who petitioned for the establishment of the road or who asked for its vacation, or by the county authorities who had the survey made and the line located and who afterwards declared the line vacated, who are presumed to be cognizant of all the highways in their county.

But perhaps the strongest evidence that it was not in fact or in the opinion of the public a public highway, is to be found in the fact that it never was so regarded by the authorities of the neighborhood, who were especially charged with repairing and keeping in order the highways of the district; it cannot be said that as a highway it needed no repairs, for the evidence is conclusive upon that question, that for a great number of years it had never been in fit condition for the public to pass over, and that no work by the road authorities had ever been

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done on either in opening it originally or in keeping it open by repairs as the same might be required for the public convenience. All these facts and circumstances contradict the theory that it was, either at the time it was obstructed by building a fence in it by defendants, or that it had been at any time previous a public highway in the legal sense of that term. We do not hesitate to say that the verdict of the jury was contrary to the evidence, and that the court erred in refusing plaintiffs in error a new trial. Feeling the fullest confidence that under the law and upon the evidence as it appears in this record, no recovery can rightfully be had against these appellants, we reverse the judgment of the circuit court and refuse to remand the cause.

Judgment reversed.

TANNER, P. J., not sitting.

MEYER & STRATMAN

v.

MADISON T. STOOKEY, Adm'r.

1. SURETY—RIGHT TO RECOUP DAMAGES SUSTAINED BY HIS PRINCIPAL.—A surety may recoup for any damages arising out of the same subject matter, to the same extent as the principal might if he were sued alone.

2. DAMAGES IN RECOUPMENT.—The evidence failing to show any data by which the jury could arrive at the amount of the damages sustained, the verdict should have been set aside. Only actual damages can be allowed in recoupment, and these must be proved.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. CHARLES W. THOMAS and Mr. HENRY A. MCGINDLEY, for appellant; against the right of the surety to set off damages arising in favor of his principal, cited Henderson v. Lewis, 9 Serg. & Rawle, 379; LaFarge v. Hasley, 4 Abbott, 397; Waterman on Set-Off, 294.

The opinion of the witness as to amount of damages is not sufficient: Sedgewick on Measure of Damages, 693.

Messrs. G. & G. A. KOERNER and Mr. R. A. HALBERT, for appellee; that the surety, when sued, can recoup damages occasioned to his principal, cited *Waterman v. Clark*, 76 Ill. 428; *Hardy v. Wadsworth*, 8 Mich. 350; *Hinerod v. Baugh*, 85 Ill. 435.

A court of probate, in the allowance of claims, is a court of equity, and equitable defenses may be set up: *Moore v. Rogers*, 19 Ill. 347; *Dixon v. Buell*, 21 Ill. 203; *People v. Harrison*, 82 Ill. 84; *Garvin v. Stewart*, 59 Ill. 229.

ALLEN, J. This was an appeal from the County Court of St. Clair county to the Circuit Court, on a claim of appellants for \$2,431.60, allowed by that court. Defendant, as administrator, resisted the allowance of the claim, upon the ground that Geo. W. Stookey, deceased, was only a surety on the notes filed for allowance. That James H. Wyatt was the principal. That the notes had been given in part payment of a livery stable, purchased of appellants in East St. Louis. That at the time of the purchase plaintiff in error gave to Wyatt a bond not to carry on the livery business in East St. Louis for three years. That the giving of this bond was a part of the transaction, and formed a part of the consideration of the notes; and that plaintiffs in error had, in violation of the condition of the bond, engaged in the livery business, to the damage of Wyatt, the principal in the notes. And defendant sought to set up the damages Wyatt had sustained by way of recoupment against the notes upon which the allowance in the County Court was made. A trial was had in the Circuit Court, which resulted in a verdict for defendant. It is insisted by plaintiffs that Stookey could not recoup any damages that Wyatt had sustained by reason of a breach of the conditions of plaintiffs' bond to Wyatt. We believe the law is otherwise, and that a surety may recoup for any damages arising out of the same subject matter, to the same extent as the principal might if he were sued alone. *Waterman v. Clark*, 76 Ill. 431; *Hinerod v.*

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Baugh, 85 Ill. 435; and in Hardy v. Wadsworth, 8 Michigan, the same doctrine is held. But we are unable to perceive in this record evidence to support the finding of the jury. The evidence does show that plaintiffs violated the condition of their bond to Wyatt by engaging to some extent in the livery business, but there are no data in the evidence by which the jury could arrive at the amount of the damages. How much he was damaged by their furnishing livery for funerals, or for any other purpose, does not appear from the testimony of any witness.

It is true that Wyatt testifies that he was damaged six or seven thousand dollars by the conduct of plaintiff, but he gives no facts or circumstances upon which the jury could arrive at the correctness of his conclusions. This is too vague and uncertain to warrant a jury in finding that he had been damaged to the extent of \$2,431.60, or any other particular sum. And as this is not a case in which exemplary or punitive damages could be allowed at all, but only actual damages, juries are not allowed to enter the field of speculation in arriving at their verdict. We think it was error for the court to refuse to set aside the verdict and grant the parties a new trial. In this view of the case we do not stop to examine the points made in the instruction given or refused.

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

WINFIELD STILLEY

v.

NATHAN G. KING.

AMENDING APPEAL BOND.—Plaintiff appealed from a justice and filed a bond. In response to a rule in Circuit Court he filed an amended bond, which mis-recited the date of the judgment, as shown by the transcript. On motion to dismiss the appeal for this defect in the bond, plaintiff asked leave to amend by giving the correct date. *Held*, that the amendment should have been allowed.

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ERROR to the Circuit Court of Washington county; the Hon. AMOS WATTS, Judge, presiding

Mr. GEORGE VERNOR and Mr. JAMES M. ROUNTREE, for plaintiff in error; that the amendment should have been allowed, cited Rev. Stat. 1874, 648, § 69; *Wear v. Killeen*, 38 Ill. 259; *Horner et al. v. Goe*, 64 Ill. 178

Mr. L. M. PHILLIPS and Mr. CHARLES ROSE, for defendant in error; that the variance between the bond and the record of the judgment was fatal, cited *Lemon v. Stephenson*, 40 Ill. 45; *Dietrich v. Rumsey*, 40 Ill. 50.

The offer to show that the transcript was incorrect as to dates, was properly refused: *Zimmerman v. Zimmerman*, 15 Ill. 84; *Garfield v. Douglass*, 22 Ill. 100; *Wiley v. Southerland*, 41 Ill. 25.

Leave to amend was discretionary with the court, and in this case there was no abuse of such discretion: *Crain v. Bailey*, 1 Scam. 321; *Harlan v. Scott*, 2 Scam. 65; *Griffin v. City of Belleville*, 50 Ill. 422; *Wood v. Tucker*, 66 Ill. 276.

ALLEN, J. The only question in this case is, whether the Circuit Court erred in not allowing plaintiff in error time to file an amended appeal bond, and in dismissing his appeal. The record shows the case was brought to the Circuit Court on appeal from the judgment of the justice of the peace. The record further shows that on the 9th day of October term, 1876, a motion was entered to dismiss the appeal on account of the insufficiency of the appeal bond accompanied by an affidavit of the irresponsibility of the sureties on the bond. That on the 10th day of the term plaintiff in error asked and obtained leave to file amended bond by 12th Oct. day of the term. Amended bond was filed, and on the 13th day of October defendant moved to dismiss because the bond misdescribed the date of the judgment; and on the 14th October plaintiff's attorneys asked leave to file affidavits showing the date in bond was the true date, and that transcript bore wrong date, but the court refused to hear the affidavit; whereupon plaintiff asked further time to file

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amended appeal bond, conforming to the date of transcript as shown by the transcript, but the court refused to give further time, and dismissed plaintiff's appeal. We are of opinion that under the circumstances further time to perfect appeal bond ought to have been given. Plaintiff's counsel may have made a mistake in supposing it was better to amend the transcript than to amend the bond, and unless the cause was called for trial, leave ought to have been granted to file amended bond. For this reason this cause is reversed and remanded.

Reversed and remanded.

FINDLAY MCGREGOR

v.

NATHAN T. EAKIN.

1. SLANDER—WORDS ACTIONABLE PER SE.—The words "You are a God damned liar and a thief, and I can prove it," are actionable in themselves, and if proved to have been spoken, entitle the plaintiff, under a plea of not guilty, to a verdict.

2. INSTRUCTIONS.—An instruction that strict proof of the words charged as slanderous is required, is incorrect. The rule is that they shall be substantially proven.

ERROR to the Circuit Court of Jackson county; the Hon. MONROE C. CRAWFORD, Judge, presiding.

MESSRS. SMITH & STEVENS and Mr. C. H. LAYMAN, for plaintiff in error; that proof of a repetition of the slander is admissible in aggravation of damages, cited 2 Greenleaf's Ev. § 418; Hatch v. Potter, 2 Gilm. 725.

As to what constitutes a repetition of the slander: Nelson et al. v. Borchonious, 52 Ill. 236.

Malice is implied in the utterance of slanderous words: Bouv. Law Dic. title "Malice;" Gilmer v. Eubank, 13 Ill. 271; Hooley v. Brooks et al. 20 Ill. 116.

Heat and passion cannot be considered in mitigation of damages: Miller v. Johnson, 79 Ill. 58.

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Instructions, when taken together, should be consistent: *C. B. & Q. R. R. Co. v. Payne*, 49 Ill. 499.

An instruction that if the jury believe there is a "substantial variance" etc., they should find for the defendant, is erroneous; *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213.

In torts the allegations in a declaration are divisible, and a recovery may be had where a part only are proven: 1 *Chitty's Pl. *387*; *Hite v. Blandford*, 45 Ill. 9.

An averment of words spoken concerning the plaintiff would support a verdict for plaintiff, without indicating the *person* in which they were spoken: *Barnes v. Hamon*, 71 Ill. 609.

MR. A. R. PUGH and **MR. WM. J. ALLEN**, for defendant in error; that an averment of words spoken in the third person is not supported by proof of words spoken in the first, cited *Norton v. Gordon*, 16 Ill. 38; *Sandford v. Gaddis*, 15 Ill. 229; *Wilborn v. Odell*, 29 Ill. 456; 2 *Greenleaf's Ev. § 414*.

The second instruction given for defendant was correct: *Flagg v. Roberts*, 67 Ill. 485.

Malice is the gist of the action: *Sandford v. Gaddis*, 15 Ill. 229; *Zuckerman v. Sonnenschein*, 62 Ill. 115; *Cummerford v. McAvoy*, 15 Ill. 313.

Presumption of malice may be rebutted: *Bouv. Law Dic.* title "Slander;" *McKee v. Ingalls*, 4 *Scam.* 30.

Circumstances tending to disprove malice may be shown: *Thomas v. Dunnaway*, 30 Ill. 373; *Townshend on Slander § 473*; *Ayres v. Grider*, 15 Ill. 37; *The People v. Greer*, 43 Ill. 213.

Anger may be considered by the jury in mitigation of damages: *Thomas v. Fischer*, 71 Ill. 576.

Testimony of witnesses as to what they understood defendant to mean was properly refused: *Linn v. Sigbee*, 67 Ill. 75; *Bishop v. Gorgeson*, 60 Ill. 484.

ALLEN, J. Plaintiff in error brought his suit for slander in the Jackson Circuit Court, against defendant. The declaration contained three counts; the 2nd and 3d counts laid the words to have been spoken in the third person, and there being no

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proof in the record to sustain any such words, it is unnecessary to notice them. To the declaration the defendant entered a plea of "not guilty."

The first count alleges that defendant spoke of and concerning plaintiff these words: "You are a God damned liar and a thief, and I can prove it;" "you are a damned thief," etc., with several other sets of words amounting in substance to the same charge of being a thief. These words are actionable in themselves, and if proven entitled the plaintiff under a plea of not guilty to a verdict. Were they proven?

W. H. McLaughlin testified that in a dispute between the parties, defendant said to plaintiff: "You are a God damned liar and a thief, and I can prove it." Charles Plater testified that defendant said to plaintiff: "You are a God damned liar and a thief, and I can prove it." John Conners testified that defendant said to plaintiff: "You are a God damned scoundrel and a thief, and I can prove it." The plaintiff testified that defendant said to him: "You are a God damned liar, and a thief and a scoundrel, and I can prove it." The defendant, in his testimony, while denying that the words as laid in the declaration were the words he used, says that he was "angry, and don't recollect what he did say." We have no hesitation in saying that the slanderous words as laid were proven, and that under the plea of "not guilty" the verdict should have been for the plaintiff. The court gave for defendant the following instructions, numbered 1 and 5:

1. "The court instructs the jury, that the allegations in the declaration, that slanderous words were spoken of and concerning a person, will not be sustained by words spoken to a person. The words must be substantially proven as laid in the declaration, and if you find from the evidence that there is a substantial variance between the words charged and the words proven, you will find for the defendant."

5. "The court instructs the jury, that in this class of cases strict proof of the words charged as slanderous, are required, and a substantial variance between the words charged in the declaration and the words uttered, would defeat the action. And if you believe from the evidence, that there was a

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substantial variance between the words proven and the words charged in the declaration, you should find for the defendant.”

We believe that the first propositions contained in each of these instructions is incorrect. The proposition in the first would be correct if applied to the second count, where the words were charged to have been spoken in the third person; but when applied to words as laid in the first count it is inapplicable, and was calculated to mislead the jury. If the law was as stated in the first proposition (and some authorities seem to favor that view), we think the rule as now recognized is otherwise. *Thomas v. Fischer*, 71 Ill. 576.

In the 5th instruction, the jury are told “that in this class of cases strict proof of the words charged as slanderous are (is) required.” Now the rule, as we understand it, does not require strict proof of the words as laid, but only requires that they be substantially proven. *Thomas v. Fischer*, *supra*. It is true that the last proposition in both these instructions lays down the rule correctly; but how is a jury to determine by which proposition they are to be governed—the first proposition in each being inconsistent with what follows, both instructions would tend to confuse if not mislead a jury. The verdict was for the defendant; a motion for new trial by plaintiff was overruled by the court, and judgment was rendered for defendant for costs. For these reasons we think the court erred in overruling the motion for a new trial, and in rendering a judgment for defendant, and this cause is reversed and remanded.

Reversed and remanded.

DAVID OGLE ET AL.

v.

D. HILLEARY MURRAY.

LIEN FOR MATERIALS—DECREE.—In proceedings to enforce a lien for materials furnished, if there are other creditors or incumbrancers the court should find the amount due each creditor, and direct the application of the proceeds of the sale to be made to each in proportion to their several amounts.

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ERROR to the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

MR. WILLIAM WINKELMAN, for plaintiff in error; that the decree should have shown the amount due each creditor and directed the proceeds of sale to be applied to each in proportion to their amounts, cited Rev. Stat. Chap. 82, § 17; Lunt v. Stephens, 75 Ill. 507; Tracey v. Rogers, 69 Ill. 662; Croskey v. N. W. M'f'g Co. 48 Ill. 481; Croskey et al. v. Corey et al. 48 Ill. 442.

The interest of plaintiff in error was fully set out in the petition, and should have been protected the same as if he had appeared and answered the petition: Judson v. Stephens et al. 75 Ill. 255.

MR. L. B. KRAFFT and MR. R. A. HALBERT, for defendant in error; as to the finding of the court, cited Topping et al. v. Brown, 63 Ill. 348.

ALLEN, J. Defendant in error filed his petition for material lien, charging that Taylor contracted with him for lumber, to be used on buildings situated on lot 5, block 2, in the city of Belleville, of which Taylor was owner. The petition further charges that lumber was furnished between May 6th, and July 1st, 1875. Petition charges that Taylor and wife, on the 28th of April, 1875, executed a deed of trust on said lot No. 5, to Charles W. Thomas as trustee of David Ogle, to secure a note for \$1,500, given by Taylor to Ogle. Petition makes David Ogle defendant with others. Upon a hearing the court found due defendant in error the sum of \$153.63. The court further found that David Ogle held a trust deed, as stated in petition, to secure \$1,500 and interest thereon. The court further found that the increased value of the lot by reason of material furnished was \$250, and that the total value of the premises was \$2,500. The court also found that the People's Bank of Belleville and Jane T. Hinkley had liens paramount to the trust deed of Ogle, and upon these findings decreed that the said Taylor pay defendant in error in thirty days the \$150.63 found

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due him, and that in default the Master in Chancery advertise and sell the lot aforesaid, and that out of the proceeds he pay first, the cost; then to defendant in error \$150.63, and that he bring the surplus, if any, into court. The record shows a sale by Master under decree to defendant in error for \$193.60—\$40.65 of which was applied to payment of costs, and balance to the payment of defendant's decree. In this decree there is manifest error. Chapter 82, § 15, provides: "That the court shall ascertain the amount due each creditor, and shall direct the application of the proceeds of sales to be made to each in proportion to their several amounts." In this decree the court fails to find the amount due Ogle on his note secured by trust deed, and failed to direct the application of the moneys arising from the sale by the Master to the payment of Ogle's debt, or any part of it.

From the finding of the court as to the original amount of the Ogle debt, we are led to believe the clerk or some one else has omitted to insert some portion of the finding of the court, and of that portion of the decree which directs the Master as to the disposition of the funds arising from the sale.

For these errors the decree of the Circuit Court must be reversed and the cause remanded.

Reversed and remanded.

AMELIA FOSTER ET AL.

v.

A. X. ILLINSKI.

8	345
73	163
8	345
102	1303

1. ATTACHMENT—TIME OF MAKING AFFIDAVIT.—The ground for an attachment should exist at the time the proceeding is commenced, and for this reason the time intervening between the making of the affidavit and the commencement of attachment proceedings, should not be unreasonable. The two acts need not be simultaneous, but done within a reasonable time; and what is a reasonable time is to be judged of by the situation of the parties. In this case, eleven days was held to be an unreasonable time.

2. LEVY—RETURN SHOULD SHOW PROPERTY WAS DEFENDANT'S.—The return upon the attachment writ should show that the property was levied upon as belonging to the defendant.

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ERROR to the Circuit Court of St. Clair county; the Hon. AMOS WATTS, Judge, presiding.

Mr. WILLIAM WINKLEMAN, for plaintiffs in error; that the affidavit should be made and filed at the time the writ issued, cited Rev. Stat. 1874, 152, § 2; Wilson v. Arnold, 5 Mich. 98; Fessenden v. Hill, 6 Mich. 242; Campbell v. McCahan, 41 Ill. 46.

The return should state that the property was levied upon as belonging to the defendant: Cost v. Rose, 17 Ill. 276; Boyland v. Boyland, 18 Ill. 551; Pardon v. Dwire, 23 Ill. 572; Clay v. Neilson, 5 Rand. 596; Tiffany v. Glover, 3 G. Green, 387; Mason v. Anderson, 3 Mon. 293; Anderson v. Scott, 2 Mo. 15; Johnson v. Johnson, 26 Ind. 142; Meaby v. Zigler, 23 Tex. 88; Refina v. McPherson, 2 Kan. 340; Pelton v. Planter, 13 Ohio, 209; Reitz v. The People, 77 Ill. 518.

Plaintiffs in error being non-residents, and having no notice of the suit, have waived nothing, and may urge these defects in the appellate court: Willetts v. Ridway, 9 Ind. 367; Thormyer v. Sisson, 83 Ill. 188.

Mr. WM. G. LAUNTZ and Mr. M. MILLARD, for defendant in error; that the affidavit was made within a reasonable time, cited Drake on Attachment, § 111; Creagh v. Delane, 1 Nott. & McCord 189; Wright v. Reagland, 18 Tex. 289; Graham v. Bradbury, 7 Mo. 281.

A return is sufficient without stating that the property levied upon was the defendant's: Johnson v. Moss, 20 Wend. 145; Bickerstaff v. Patterson, 8 Porter, 245; Kirksey v. Bates, 1 Ala. 303; Miller v. McMillen, 4 Ala. 527; Thornton v. Winter, 9 Ala. 613; Saunders v. Columbus & Co. 43 Miss. 583; Rowan v. Lamb, 4 G. Greene, 468.

WALL, J. This was an attachment proceeding brought by Illinski against Foster. The affidavit alleged that the plaintiff was a resident of Cahokia, in St. Clair county, and that defendants were not residents of the State. It was sworn to before a notary public of said county, on the 2nd day of August, 1877,

and filed in the office of the clerk of the Circuit Court on the 13th day of August, on which latter day the writ was issued. The attachment having come into the hands of the sheriff, he made the following return: "By virtue of the within writ, I have this 13th August, 1877, levied upon the following described real estate, to wit: Lots 31 and 34 of the commons of Prairie du Pont, St. Clair county, Ill., as laid out on the plat of said commons, book A, page 77, St. Clair county, Ills. Defendants not found in my county." At the January term, 1878, default was entered against the defendants, it appearing that notice of the pendency of the suit had been given by publication. It is assigned as error that the writ was improperly issued upon this affidavit, the latter having been sworn to eleven days before it was filed in the clerk's office. The affidavit is the foundation and the commencement of the suit. The statute does not provide in terms when it should be made, but it is necessary, of course, that the ground of attachment should exist at the time the proceeding is commenced. The doctrine of presumption, as known in the law of evidence, that a certain fact or condition having been proven to exist, its continued existence will be presumed until the contrary is shown, does not apply. The proceeding is purely statutory, and a substantial compliance with the provision of the statute is essential to the validity of the judgment. In the case of *Campbell v. McCahn*, 41 Ill. 47, a similar question was considered by the Supreme Court. There the proceedings were in chancery; the defendant not being personally served, notice was given by publication. Twenty days intervened between the making of the affidavit and the filing of the bill. It was there said that the law being remedial, it ought to be liberally construed, so as to promote the remedy, and therefore it was not deemed essential that the affidavit should be sworn to simultaneously with the filing of the bill. It would be sufficient if filed within a reasonable time, and what was a reasonable time must depend upon the circumstances of each case. Where the person making the affidavit resides in the county in which the suit is brought, less time would be reasonable than where he resided in a different county; and in the latter case less than where he resided in a

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different State. In such case a reasonable time should be allowed within which to transmit the affidavit to the place where it is to be used. It was held that twenty days was obviously an unreasonable time to transmit the affidavit from an adjoining county. Allowing for the irregularity of the post or the delay of messenger, it was manifest no such time was necessary; and the conclusion was reached that the publication was unwarranted, and failed to give the court jurisdiction.

Testing this case by the reasoning of that case, it would seem clear that the writ was improperly issued. The plaintiff was a resident of the same county and within easy communication by railroad of the county seat. One day would have been ample time within which to make the visit and return, or to send the affidavit by mail, and if the question what is a reasonable time is to be solved by ascertaining how long would in the exercise of ordinary diligence be required to make the affidavit and lodge it in the office of the clerk, there can be no doubt that the time employed in this case was too long. It is also urged that the return of the officer does not show a levy upon the property of the defendant. We have examined the various authorities cited as to the effect of this omission. They are not harmonious, but we think the better rule is that the return should show that the property was levied upon as belonging to the defendant, and such seems to have been the view entertained by the Supreme Court in the case of Reitz et al. v. The People, etc. 77 Ill. 518. The judgment will be reversed and the cause remanded with leave to amend the affidavit and return.

Reversed and remanded.

School Directors, etc. v. First Nat. Bank of Greenville.

SCHOOL DIRECTORS, etc.

v.

FIRST NATIONAL BANK OF GREENVILLE.

PAYMENT OF TEACHERS—SCHEDULES—AUTHORITY OF DIRECTORS TO DRAW ORDERS.—The school law provides that until a schedule is filed with the township treasurer, properly certified by the school directors, it shall not be lawful for such treasurer to pay any teacher, or any two members of the board of directors to draw an order in favor of such teacher. An order drawn by the board of directors before the filing of a schedule, is illegal and void in whosoever hands it may be, and no recovery can be had thereon against the district.

APPEAL from the Circuit Court of Bond county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

MR. WILLIAM H. DAWDY and MR. EDWARD Y. RICE, for appellant; as to the power of school directors to draw orders on the treasurer, cited Rev. Stat. 1874, 965, § 53; *Newell v. School Directors*, 68 Ill. 514; *Glidden et al. v. Hopkins*, 47 Ill. 525.

If the order is to be regarded as an inland bill, it should have been presented within a reasonable time: 1 *Parsons on Contracts*, 265; *Cayuga Bank v. Hunt*, 2 Hill, 635; *Wiseman v. Chiapella*, 23 How. 368.

As to effect of failure to give notice of non-payment: 1 *Parsons on Contracts*, 277; *Goldenau v. Davis*, 23 Cal. 256.

Judgment should be reversed because it awarded execution against the school district. Rev. Stat. 1874, 963, § 49; *Botkin v. Osborne*, 39 Ill. 101

Messrs. PHELPS & PHELPS and MR. D. H. KINGSBURY, for appellee; that the order was drawn and issued in accordance with the statute, cited Rev. Stat. 1874, 966, §§ 54, 67.

The treasurer became personally liable to the district for paying out money without an order therefor: Rev. Stat. 1874, 970, § 67.

Delay in presenting the order will not prejudice the holder,

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there being no intervening loss of funds by bankruptcy or otherwise: *Howes v. Austin*, 35 Ill. 396; *Willetts v. Paine*, 43 Ill. 432; *Murray v. Judah*, 6 Cow. 484.

The consideration of a school order may be inquired into, even after assignment: *Newell v. School Directors*, 68 Ill. 514.

TANNER, P. J. This cause was tried in the Circuit Court of Bond County, on appeal from a justice of the peace, and was brought upon an order drawn by the school directors of District 6, T. 7, R. 3, under the provisions of section 54, chapter 122, R. S. 1874. The order was drawn in the form prescribed in section 67 of same chapter. The cause was heard by the court without a jury, and verdict was found for the plaintiff. The defendants asked, but were denied a new trial, and the court rendered judgment for the amount of the order with costs. The appellants bring the cause to this court, and allege as error, the refusal of the court to grant a new trial, and the rendition of judgment for appellee. The facts briefly stated are, that a female teacher taught school in said district for one month; sent her schedule by her husband to the directors of the district, for examination and a certificate, as required by law. One director was found, who having examined and finding it correct, signs it and returns it to the husband to carry to the other directors. He also signed an order for the amount due the teacher, as per schedule, and also handed the order to the husband to carry to the other directors. The same papers are, on the same day, presented to another director, who also examines, signs, and returns them to the husband, and instructs him to give the schedule to the township treasurer, and the order to the teacher. The order was three days afterwards purchased by and assigned to the appellee for full value; and, not being paid, suit is brought against the directors. The order was drawn and the schedule certified on the 23d of November, 1875, and about the 20th of December following, the husband of the teacher presented the schedule to the treasurer of said town, who examined and found the certificate upon the schedule in proper form. He inquired whether an order had been drawn on him for the amount due,

and was told by the husband that the directors had drawn no order for the amount, but he wanted the money; the treasurer informed him that there was no money in the treasury belonging to town 6. On the 17th day of April following, the husband of the teacher returned to the treasurer, and upon stating that no order had ever been given by the directors for the amount due on the schedule, the treasurer paid the money, and took receipt for the same. The treasurer had been authorized by the teacher to make payment to her husband. Some three weeks after the payment of the money, the cashier of the appellee presented to the treasurer the order in suit, and demanded payment. Up to this date, the treasurer had received no notice that the order was in existence. The foregoing are substantially all the facts developed by the record, which can be invoked to sustain the judgment of the court. In *Glidden v. Hopkins*, 47 Ill. 525, the court, in speaking of the powers and duties of school directors, uses this language:

"The board of school directors, though a corporation, are possessed of certain specifically defined powers, and can exercise no others, except such as result by fair implication from the powers granted. As a corporation, they are but the agents of the tax-payers and inhabitants of the district. Every official act which they perform is for their constituents the inhabitants and tax-payers--and for the doing of the act, when questioned, they must show their authority." And this rule is re-stated in the case of *Newell v. School Directors*, 68 Ill. 514. Does the act of the directors in drawing the order in the case before us, when tested by the foregoing rule, create a liability for its payment? We think not. The latter clause of the 53d section of the school act provides "schedules certified as aforesaid, by at least two directors, shall be filed by said directors with the township treasurer; and until such schedule and report as aforesaid shall have been filed as aforesaid, it shall not be *lawful* for said treasurer to pay said teacher, or any two members thereof to draw an order in favor of said teacher." The order in this case was made about one month before the schedule was filed with the treasurer, and was therefore unlawfully drawn. If drawn unlawfully it was void; and if void,

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in the hands of the drawee, no rule of commercial law could impart vitality to it. It is said, however, by counsel for the appellee, that the schedule was filed with the treasurer within a short time after the order was drawn. Be it so; this fact will in no wise help the appellee. If it was unlawful to draw the order before the schedule was filed, the shortness of the time that intervenes could not make the act lawful. The directors when they drew the order were not with the treasurer; and the testimony shows that he never knew that the order had been drawn until notified by the appellee, some six months thereafter. They certified to the correctness of the schedule, and drew the order for the money, and delivered both to the teacher, through her agent. *Laches* cannot be imputed to the tax-payers and inhabitants of school districts; and the only safe rule that the courts can establish for their security—in the payment and distribution of the moneys set apart to and contributed by them, through the various forms of taxation, for the education of their children,—is to hold all school officers to a strict compliance with all the provisions of law in reference to their conduct as such: and to charge all persons dealing in orders drawn upon the school funds, with notice of the want of power for so doing.

Directors of schools in drawing orders on the treasurer of the township for the payment of moneys, stand on a very different footing than private individuals; they are the agents constituted by law for the proper disbursement of the funds belonging to the inhabitants of the school districts; and therefore, when sued upon orders issued by them unlawfully, they are not deprived of presenting a successful defense by any rule of law in reference to the execution, and putting into circulation of negotiable paper by individuals or private corporations.

In the case of *Newell v. School directors*, *supra*, the court says: "We are inclined to hold that, as the orders are payable to the individuals to whom they are issued, or bearer, they may pass by indorsement so as to vest title in the assignee, and authorize him to institute suit in his own name; but we think there is a wide and marked difference between the rights of the assignee of such orders, and the rights of the assignee of

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promissory notes or bills of exchange before maturity." True, in that case the court held the order void in the hands of the assignee, because it was apparent from its face that it was not drawn in conformity to the requirement of the statute, and was therefore notice to all who should deal with the same; we now, however, have under consideration the character of an order, regular on its face, and were we inclined to regard the conduct of the directors, in drawing it before the schedule had been filed with the treasurer, as a mere irregularity, the authority cited would not perhaps, be conclusive upon the rights of the appellee. But we must hold, inasmuch as the statute declares "it shall not be lawful to issue such orders until the schedule has been filed with the treasurer," that it was void when drawn, and no one can claim to be an innocent holder. We think the judgment of the Circuit Court erroneous, and as no recovery can be had on the order, in accordance with the views we entertain, we reverse the judgment of the Circuit Court, but decline to remand the cause.

Reversed.

FERDINAND HANNEBUTT

v.

ROBERT H. CUNNINGHAM.

REPLEVIN—PROPERTY IN CUSTODY OF UNITED STATES MARSHAL.—A plea that the property replevied was held by the United States Marshal by virtue of a writ of execution issuing out of the Circuit Court of the United States, presents a complete defense as to the jurisdiction of the State court over the subject-matter in the replevin suit.

ERROR to the Circuit Court of Randolph county; the Hon. AMOS WATTS, Judge, presiding.

Mr. W. C. KUEFFNER, for plaintiff in error; that the State courts cannot interfere with the process of the Federal courts, cited *Munson v. Harroun*, 34 Ill. 422.

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Property once levied upon is in the custody of the law, and cannot be taken by another execution: *Hogan v. Lucas*, 10 Pet. 403; *Taylor v. Caryl*, 20 How. 583; *Freeman v. Howe et al.* 24 How. 453.

Courts will, at any stage of the case, take notice of want of jurisdiction over the subject-matter: *Foley v. The People*, Breese, 57; *Leigh v. Mason*, 1 Scam. 249; *Ginn v. Rogers*, 4 Gilm. 131.

A chattel mortgage, to be valid, must be acknowledged before a justice of the peace of the precinct where the mortgagor resides: Rev. Stat. 711, § 2.

The sheriff or marshal has power to appoint a special deputy to serve process: *Guyman v. Burlingame*, 36 Ill. 201; *Dungan v. Hall*, 64 Ill. 254.

Messrs. GREEN & GILBERT, for defendant in error; that the plea was a plea to the jurisdiction of the person, and came too late after plea in bar, cited 1 Chitty's Pl. 477; 3 Johns. 105.

Where property of B. is held by a United States Marshal by an ordinary execution, B. can maintain replevin therefor in the State courts: 1 Kent's Com. 452; 14 Gray, 566; 6 N. J. Law, 370; 3 Martin (La.) 602; 2 Curtis, 465; 1 Curtis, 311.

Pleadings are construed most strongly against the pleader: *Dana v. Bryant*, 1 Gilm. 104; *People v. Gray*, 72 Ill. 343.

General ownership of property is not necessarily determined in replevin, but the right of possession is: 18 Ill. 83; 1 Chitty's Pl. 187.

TANNER, P. J. This was an action of replevin instituted in the Randolph Circuit Court, by the defendant in error, and the writ was levied upon certain property in the possession of the plaintiff in error. The plaintiff in error filed four pleas, the first and second being *non cepit* and *non detinet*, and upon which issue was joined. To the third and fourth pleas the defendant in error interposed a general demurrer, which the court overruled as to the third plea, and sustained as to the fourth plea. The plaintiff in error excepted to the ruling of the court in sustaining the demurrer to the fourth plea, and

elected to stand by the plea. The substantial portion of his plea sets forth, that on the 6th day of June, 1877, August Rode and Gerhard H. Barth, as surviving partners of the firm of A. Rode & Co., recovered in the Circuit Court of the United States for the Southern District of Illinois, a judgment for \$2,464.76 and costs, against Matthew and Thomas Donohoo; that an execution was duly issued on this judgment, directed to the United States Marshal of said District; that the defendant, Hannebutt, as the legally appointed special deputy of said marshal, levied said execution on the property in controversy on the 10th day of July, 1877, and, that at the time of the commencement of this suit, and the levy of the writ of replevin therein, the said goods were in the custody of said marshal, holding custody by the defendant, Hannebutt, and and that by virtue of said levy, the said marshal acquired such a special property in said goods, etc., as cannot be questioned in this court. It is only necessary to notice the first error assigned, which is, that the court erred in sustaining the demurrer to the fourth plea.

It is insisted in support of the ruling of the court in this respect, that the plea was to the jurisdiction of the court over the person of the plaintiff, and therefore its advantage as such was lost, by the order in which it was presented. This view is unsound. The action is replevin and the controversy arose upon the right to the possession of the property taken under the writ. The plea, therefore, raises the question of jurisdiction over the subject-matter of the action, rather than to the person. The rule is that at any stage of the proceedings a discovery of a want of jurisdiction over the subject-matter, requires the court to dismiss the suit. The sufficiency of the plea is also questioned by the defendant in error; but we are disposed to regard the plea as clearly showing that the property at the time it was taken under the writ of replevin, was in the possession of the marshal of the United States, under and by virtue of an execution, issued from the Circuit Court of the United States for the Southern District of Illinois, and, therefore, presented a complete defense as to the jurisdiction of the court. This is not an open question; it was settled by the

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Supreme Court of our State, in the case of *Munson v. Harroun*, 34 Ill. 422. That case was in all respects, the same as the one now before us, and the right of the State courts to obstruct the officers of the United States in the execution of final process from its courts was raised by plea, in the same manner as in this. Therefore, in accordance with the decision cited, we hold that the court erred in sustaining the demurrer to the fourth plea, and for this reason the judgment is reversed and the cause remanded.

Reversed and remanded.

GEORGE PARKER ET AL.

v.

JACKSON SMITH ET AL.

1. **BONDS IN AID OF RAILROADS—CONDITIONS OF SUBSCRIPTION—NON-PERFORMANCE BY RAILROAD—ENJOINING TAX.**—Where the conditions upon which a town was authorized to subscribe for a railroad, were that such road should be built through the township within one-half mile of the court house, and should terminate at or near the city of V., the building of a road across one corner of such township and terminating at a small village nine miles from V. is not a substantial compliance with the conditions of the vote for subscription, and bonds issued in pursuance of such vote are invalid and no tax can be collected to pay interest thereon though they may be in the hands of innocent holders.

2. **RECITALS—ESTOPPEL.**—A bond reciting that it is issued by virtue of an Act to incorporate the P. & D. R. R. Co. and in accordance with the vote of the electors of said town, although it may preclude an inquiry as to whether an election was held and a vote authorizing the bonds to issue, yet it could not conclude an inquiry into the performance of a condition that was to be performed after the bonds issued. Such a conclusion would be in direct conflict with the statute of 1869.

3. **CONDITIONS IMPOSED BY TOWN.**—The statute of 1869, giving to towns the right to prescribe conditions upon which subscriptions should be made or bonds issued, and declaring that such bonds or subscription shall not be valid and binding until the conditions shall have been complied with, applies to the bonds under all circumstances, in whosoever hands they may be.

APPEAL from the Circuit Court of Crawford county; the Hon. JOHN H. HALLEY, Judge, presiding.

Messrs. PARKER & OLWIN and Mr. J. C. MAXWELL, for appellants; contending for the right of a township to impose conditions to its subscription, cited *People v. Dutcher*, 56 Ill. 144; *People v. Glann et al.* 70 Ill. 232; *Alley et al. v. Adams County*, 76 Ill. 101; *S. & I. S. E. R'y Co. v. Cold Spring*, 72 Ill. 603; *Laws 1869, 319*; *Ill. Cent. R. R. Co. v. Town of Barnet*, 85 Ill. 313.

Bonds issued without a compliance with the conditions, would not be valid: *Town of Eagle v. Kohn et al.* 84 Ill. 295; *Laws 1869, 319, § 7*.

The supervisor and town clerk are not the authorities to determine when conditions precedent have been performed: *Middleport v. Ætna Life Ins. Co.* 82 Ill. 562; *Rev. Stat. 1877, Chap. 139, § 118*.

They could not subscribe the stock and issue bonds except at a regular town meeting or by order of the town board: *Bouton et al. Board of Supervisors*, 84 Ill. 384.

If the vote was for a division of the road, bonds could not be issued to the entire line: *McWhorter v. People*, 65 Ill. 290.

A change in the termini of the road defeats the subscription: *Banet v. A. & S. R. R. Co.* 13 Ill. 513; 1 *Redfield on Railways*, 411; *Cooley on Constitutional Limitations*, 215.

The burden of proof is upon the railroad to show that the subscription was authorized by a vote of the people prior to the adoption of the Constitution: *Jackson County v. Brush et al.* 77 Ill. 59; *Madison County v. The People*, 58 Ill. 456.

The township is not liable for the unauthorized acts of its officers: *Board of Trustees v. Schroeder*, 58 Ill. 353.

When a condition precedent in an election notice has not been complied with, the election is void: *McWhorter v. The People*, 65 Ill. 290; *People v. Chapman*, 66 Ill. 137.

The supervisor did not act as moderator of the election, and the polls were not open until 11 o'clock A. M.: *The People v. Town of Santa Anna*, 67 Ill. 57.

Town officers cannot delegate their powers: *East St. Louis v. Wehrung*, 46 Ill. 392; *Clark v. Hancock Co.* 27 Ill. 305; *Jackson Co. v. Brush et al.* 77 Ill. 59; *County of Richland v. The People*, 11 *Chicago Legal News*, 43, [*ante*. 210.]

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A purchaser of municipal bonds issued without authority is not an innocent purchaser. It is his duty to look to the authority under which the officers issuing them acted: *Town of Pana v. Lippincott et al.* 2 Bradwell, 466; *The Floyd Acceptances*, 7 Wall. 666; *Marsh v. Fulton County*, 10 Wall. 676; *Loan Association v. Topeka*, 20 Wall. 660; *Elmwood v. Marcy*, 2 Otto, 289; *Town of Concord v. Savings Bank*, 2 Otto, 625; *Harkman v. Bates County*, 2 Otto, 572; *Baltimore v. Reynolds*, 20 Md. 1; *Hodges v. Buffalo*, 3 Com. 430; *Livingston v. Weider*, 64 Ill. 427; *Dillon on Mun. Cor.* § 372; *Hartman v. Bates Co.* 8 Chicago Legal News, 305; *McCoy v. Briant*, 11 Chicago Legal News, 84; *School Directors v. Fogleman*, 76 Ill. 189; *Bissell v. v. Kankakee*, 64 Ill. 249.

The road should be equipped as well as built to its terminus, to comply with the conditions: *P. & D. R. R. Co. v. Henderson et al.* Sup. Ct. Ill. 1878.

The road not being built according to conditions, the bonds were not entitled to registration: *Gross' Stat.* 1869, Chap. 86, § 96; *McWhorter v. The People*, 65 Ill. 290; *Flack v. Hughes*, 67 Ill. 384.

Statutes increasing the burden of taxation must be strictly construed, 68 Ill. 132.

Fraud vitiates all contracts: *Sims v. Klien, Breese*, 302.

MR. E. CALLAHAN, MR. F. ROBB and MR. P. G. BRADBERRY, for appellees; that a bill cannot be filed by one tax-payer for himself and all other tax-payers, cited *High on Injunctions*, § 757; 2 *Dillon on Mun. Cor.* § 735; *DuPage County v. Jenks*, 65 Ill. 275.

If the town had authority to issue the bonds, the tax cannot be enjoined: *Dillon on Mun. Bonds*, 16; 1 *Dillon on Mun. Cor.* 415.

Irregularities in the execution of the power constitute no defense to the bonds: *Burr v. City of Carbondale*, 76 Ill. 455; *Maxcy v. Williamson Co.* 72 Ill. 307.

The supervisor, assessors and collector were judges of the election; *Rev. Stat.* 1869, 778, § 1; *Rev. Stat.* 1874, 457, § 40.

The supervisor and town clerk were the proper authorities to

determine if the conditions precedent had been performed: Dillon on Mun. Bonds, 22; Jackson Co. v. Brush, 77 Ill. 59.

The law provides for registration of the bonds, and this having been done, the tax must be levied: Dunnovan v. Green, 57 Ill. 63.

The recital in the bond, by the proper officer, that an election was held, is conclusive: Knox Co. v. Aspinwall, 21 How. 539; Dillon on Mun. Bonds, 24.

If the vote was for the subscription, the law made it the duty of the supervisor to issue the bonds: Ill. Mid. R'y Co. v. Town of Barnet, 85 Ill. 321; People v. Logan Co. 63 Ill. 374; Naper Valley R. R. Co. v. Naper Co. 30 Cal. 437.

The issue of the bonds was a waiver of irregularity in performing the condition: Chiniquy v. The People, 78 Ill. 570.

So long as the road subserves all interests, a change of route does not release a subscription: Barnet v. A. & S. R. R. Co. 13 Ill. 513; Sprague v. I. R. R. Co. 19 Ill. 174; Ill. R. R. R. Co. v. Zinneer, 20 Ill. 654; Ill. R. R. R. Co. v. Beers, 27 Ill. 185; Rice v. R. I. & A. R. R. Co. 21 Ill. 93; Redfield on Railways, 211.

After the road has been built on the faith of the vote, the municipality should be estopped from impeaching the election and enjoining the issue of the bonds: Prettyman v. Tazewell Co. 19 Ill. 406; Butler v. Dunham et al. 27 Ill. 474; Robertson v. City of Rockford, 21 Ill. 457; Johnson v. Stark Co. 24 Ill. 85; Perkins v. Lewis, 24 Ill. 208.

In all cases where the right to add conditions to subscriptions has been sustained, the conditions appeared in the petition and notices: People v. Dutcher, 56 Ill. 148; People v. Glann, 70 Ill. 232.

Delay in opening the polls will not affect the validity of the election: Platt v. The People, 29 Ill. 72.

Where a terminus is to be fixed at or near a particular point, a large discretion is given to the company: Redfield on Railways, 413; Dillon on Mun. Cor. § 422; Van Hostrip v. Madison City, 1 Wall. 291

ALLEN, J. A bill was filed by plaintiffs against defendants

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to the March term of the Circuit Court, A. D. 1877, to enjoin Smith as collector of Honey Creek township, and Updyke, county treasurer, from proceeding to collect certain taxes extended against them on the books, to pay interest on \$15,000 in bonds issued by said township to the Paris & Danville Railroad Co. The bill charges that the Railroad Co. failed to keep and observe on its part the conditions upon which the subscription was made to the company's capital stock, to pay which, the bonds were issued. And that until such conditions are performed by the company, the township nor the tax-payers are liable for either the principal or interest on the bonds. The bill prays that defendants may be enjoined from collecting or proceeding to collect such tax. Upon this bill a temporary restraining order was issued by the judge of the Circuit Court. Upon filing an answer by defendants, the Circuit Court on bill, answer, affidavits and exhibits submitted, dissolved the injunction and entered a decree for cost against complainants. From this decree an appeal was prayed and allowed to this court. Several errors are assigned on the record, but we shall notice only such as seem to us to go to the merits of the controversy; and first, have the P. & D. R. R. Co. complied with the conditions upon which the subscription to its capital stock was made, and to pay which the bonds were issued by the township? If the R. R. Co. have complied, then the decree of the court was proper. If they have failed in a substantial compliance with the conditions of the subscription, then we regard the judgment of the court as error. The Paris & Danville Railroad Co. was organized under a charter granted by the General Assembly, approved March 26th, 1869, Private Laws 1867, Vol. 3, p. 144. They were authorized to construct a road from Paris, in Edgar county, to Danville in Vermillion county, and by a provision of the same charter, to extend, construct and equip their road "to a point at or near Vincennes, in the State of Indiana." By the 9th section of the charter, the company was authorized to receive subscriptions to their capital stock from counties, townships, etc.

Upon a petition of twenty-five legal voters of a township, an election to be called to vote for and against subscription to the

capital stock of the company. Such a petition was presented by the requisite number of voters to the township authorities of the township of Honey Creek; an election was called, and a subscription of \$45,000 was voted on the capital stock of the company. In the petition for an election, in the notice of an election, and also on the ballots voted, were the following conditions: No portion of said subscription to be payable, nor any interest to accrue on the bonds issued in payment thereof, until the said railroad company, its agents or assigns shall build and equip said railroad through within one-half of a mile of the court house in Robinson, in said county, and from thence to a point at or near the city of Vincennes, in the State of Indiana. Under this notice the election was held, subscription made, and bonds issued, and a return of this election was made to the county clerk, and the petition and returns filed with the clerk, and became public records in his office. The evidence in this record shows that the railroad company failed to construct the road through said township, but crossed the line out of the township near the center of the east line running north and south. The evidence further shows, and it is confessed by appellees, that instead of terminating the road at a point at or near the city of Vincennes, they fixed the terminus at Lawrenceville, nine miles from the city of Vincennes. Was this terminus at or near Vincennes in the sense in which these words are used in the charter, or as they were understood by the parties when the subscription was made. A brief review of the evidence as to the situation of the people of the township will throw some light on this question. Vincennes was the market and principal trading point for the inhabitants of Honey Creek township; they were farmers; they had no towns, villages—important villages—in their vicinity to benefit by the road. They desired a ready and cheap method of reaching the Vincennes market, where there was much competition in trade, and where there were competing railroads. It was a point to them of great advantage, if it could be reached by this railroad. Again, if they could have six miles of railroad built through their township, the tax upon the railroad property would form a large item in their municipal revenues, and to secure these

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advantages they consented to aid the railroad company to the extent of \$15,000. In their municipal bond these were the inducements that procured their assent to the subscriptions. Upon the other hand, the railroad company agreed to build and equip their road through the township and to a point at or near the city of Vincennes (the city being across the line in another State, the road could not enter without authority from the other State); this was the undertaking by the railroad company; this was what they agreed to do in consideration of the aid they were to receive from the township.

Appellees insist that they have kept these conditions; 1st, by running across the corner of the township, they have brought the road within easy access to the inhabitants of the township; that they have fixed the terminus of the road at Lawrenceville, and that that is a point near Vincennes; that their charter "speaks from Springfield," and that as compared with Springfield, Lawrenceville is near the city of Vincennes; while the charter may speak from Springfield, the contract speaks from Honey Creek township, and that is almost as near Vincennes as is Lawrenceville. Appellees say that upon a careful survey of the route to Lawrenceville, it was found a shorter and cheaper line than the line to Vincennes; the estimates of their engineer are given in proof of this, accompanied by his argument in favor of this terminus, in which he argues that this route down Bushy Flat and across the Embarrass river can be built much cheaper than to Vincennes, and will be more to the interest of the railroad company. Can it be said this consideration would release the railroad company from their obligation under this contract? If so, they might have terminated their road in Brush Creek Flat, or at the Embarrass river just as well, and from the evidence the people of Honey Creek township would have been but little less accommodated by stopping at the one place as the other, for the evidence shows that no arrangement has ever been made by the P. & D. R. R. Co. by which they could run a freight car over the O. & M. road. That it costs more to transfer their produce from one road to the other and pay the charges to the O. & M. road than to take their freight in wagons to Vincennes, as they did before the road was built. But appellees

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say they do run trains over the O. & M. road to the Union Depot at Vincennes. And the evidence shows that one passenger train is run each way, once in 24 hours, and that by their running arrangement the people of Honey Creek township are accommodated. They can reach Vincennes at 9 o'clock p. m. and leave on return trip at 4 a. m., next morning, so that there is speedy communication between the two points by rail; but if one has business to look after that requires daylight, he cannot go and return the 18 or 20 miles by rail in less than two nights and one day.

In any light in which this question can be viewed, we cannot find a compliance with the terms of the subscription, either in letter or spirit. The evidence shows that Lawrenceville is a village of but little trade, no competition among buyers and sellers of produce, and no competition in transportation lines, which always affect to a greater or less extent the value of farm products, so that so far as affording to the inhabitants of Honey Creek Township easy and cheap access to a market in that direction, the condition upon the part of the company has wholly failed. Upon the question as to the terminus of this road being within the limit prescribed by the charter and the vote, we are referred to the decision of the court in *Van Hostrip v. City of Madison*, 1 Wall. 291. In that case the subscription was made by the city to a railroad company that did not propose to build a road to the city of Madison, but a branch from Shelbyville to a connection with the Indianapolis and Madison road, which should terminate at Madison. The junction of the branch with the main line was to be at Columbus, and the court held that, inasmuch as the object of the acts under which the city could take stock in a railroad was to open lines that would bring trade to the city, that this subscription came within the spirit of the law, and the city was held liable. The facts, as well as the reasons, in that case are wholly different from this one, and we do not regard the decision of the court as in point. But it is insisted by the appellee, that the issue of the bonds by the proper township authorities was a waiver of any and all conditions precedent, and that the rights of the innocent holders of the

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bonds, for value, cannot be affected by any failure to comply with such conditions; and reference is made to *Chiniquy v. The People*, 78 Ill. 570, and to *County of Knox v. Aspinwall*, 21 How. 539. In the case reported in 78 Ill. *supra*, the court say that, "Even if there was a condition which was not performed by the railroad company, it is not shown in the record what it was; * * we must presume the condition was waived."

In the case that we are considering, the non-performance of the conditions is shown in the record. So that the authority in that case is not applicable to this. In the case, *County of Knox v. Aspinwall et al. supra*, the court say: "That the bond upon its face imported a compliance with the law under which it was issued, and that the purchaser was not bound to look farther for a compliance with a condition to the grant of power." To understand the force and application of the language in this opinion, it is well to consider the exact question that the court had before it. The county of Knox, by her commissioners, had been authorized by an act of the legislature of Indiana to make a subscription to the capital stock of the Ohio & Mississippi R. R. Co., "provided a majority of the qualified voters of said county, at an annual election, should vote for the same." A vote was had and the subscription made, and bonds issued in payment of the same. Suit was brought by Aspinwall on interest coupons that had been attached to the bonds. A defense to the suit was sought to be made on the ground that sufficient notice of the election had not been given, as the law required. The court ruled that the question was one that the law left with the commissioners to determine before making the subscription and issuing the bonds; and that having acted under the authority conferred by the law, it was to be presumed that the precedent conditions had been performed, and that such a defense as an insufficient notice could not be set up by the defendant in a suit by an innocent holder of coupons; and it was upon this question that the court laid down the rule above quoted. This same rule has been generally adopted by the Federal as well as the State courts, yet some eminent law writers have questioned its propriety; and the Federal courts have in some noted instances departed from it. Our own State courts have sanctioned

and have recognized it as the rule. Admitting the rule in its application to all the cases to which we have been referred, and giving to the language used by the court its full scope and meaning, does the case that we are considering come within that rule? What conditions precedent did the court regard as conferring authority to make subscriptions and issue bonds? Were not the giving proper notice of a vote and a vote at a regular annual election, and a majority of legal voters at such election for subscription, the precedent steps to be taken before the commissioners were empowered to make the subscriptions and issue the bonds? We understand such to have been the precedent conditions which were required, and that when the bonds were issued and passed into the hands of innocent purchasers for value, the holder would be protected; and that no irregularity in giving notice or in the vote, or in any other act necessary to give the commissioners power, could be set up in defense of their payment. But how do these decisions affect the other conditions, aside from the petition, the notice of the election, and the vote? They are not conditions to be performed before subscription or before the bonds are issued in payment therefor. The building and equipping of the road through the township, and the building and equipping of the road to a point at or near the city of Vincennes, Indiana, were conditions that were not to precede, but to follow the subscription and the issue, and were not essential to the exercise of the power to subscribe; and could only affect the liability on the subscription if not performed. It is a matter of history that railroad companies have often induced municipalities to issue their bonds before the conditions upon which they were to become payable, were performed. It was done in the faith that the railroad company had the ability and the disposition to comply with their undertakings, and keep the conditions. Railroad companies have often failed to keep the conditions. The bonds have passed into the hands of innocent holders for value, and the municipalities have been burthened and sorely oppressed by taxation to pay them, without any compensation or relief. But the act of the General Assembly, in force April 16, session Laws of 1869, page 316, § 17, provides, among other things,

Parker et al. v. Smith et al.

that in making subscriptions to railroad companies, "The municipality may impose conditions," and that subscriptions and bonds so made, shall not be valid or binding until such conditions are complied with." It is not unreasonable to suppose that this law was intended to protect municipalities in that class of cases to which we have just referred. To this act our Supreme Court have recently given an interpretation in the case of *Town of Eagle v. Kohn et al.* 84 Ill. 292. In that case suit was brought by Kohn et al. against The Town of Eagle, on interest coupons which had been attached to certain bonds issued by said town to the Plymouth, Kankakee & Pacific R. R. Co. In the vote for subscription were some conditions "that the road should be built through the town," "that a depot should be erected by the railroad company," and that bonds should be delivered as the work progressed. To this suit pleas were interposed, denying that the railroad company had kept and performed these conditions upon which the subscription had been voted, etc.

The court, after stating that the conditions were not prerequisite to making the subscriptions or issuing the bonds, "but only that the subscription and bonds were subject to the conditions," say: "The question, then, we conceive depends upon the above provision of the statute (April 16, 1869), giving the right to prescribe conditions upon which such bonds or subscription should be made, and declaring that such bonds or subscriptions shall not be valid and binding until such condition precedent shall have been complied with. What scope is to be given thereto? Whether is it to be confined in its operation to the railroad company to which the bonds shall issue, or extend to innocent holders for value. The words of the statute, by their natural force, apply to bonds under all circumstances, in whatever hands they may be. Courts are wont to allow to such peremptory language of a statute full force and effect, and when a statute expressly declares that a negotiable security, given under certain circumstances, shall be void, to hold them void, even in the hands of a *bona fide* endorser."

We have quoted at some length from this opinion, as it

seems to be the first time this particular provision of the section of this act has received a construction as to the effect it has on negotiable securities in the hands of innocent holders, and answers fully the argument of appellees, that the issue of the bonds precludes all inquiry as to a compliance with the condition of the subscription, in a proceeding where innocent holders are interested.

It is insisted that the bond upon its face shows a compliance with the conditions, and that the tax-payers are estopped from questioning it. We do not so read the bond. The recital is, that it is issued by virtue of an act to incorporate the Paris & Danville Railroad Company, "and in accordance with a vote of the electors of said town," etc. This recital may be, and perhaps is, strictly true, and under the rule would preclude any inquiry as to whether an election was held and a vote authorizing the bond to issue; but it cannot be said to conclude inquiry into the performance of a condition that was to be performed after the bonds issued; such a conclusion would be in direct conflict with the statute of 1869 and the decision of the Supreme Court under it. And so in regard to the certificate of the supervisor, that entitles the bonds to registry. The very act and the very section of the act that provides for the registry of the bonds, declares that such bonds shall not be valid until the conditions upon which they are issued shall have been complied with. We may conclude this opinion in the words of the Supreme Court in *Eagle v. Kohn*, *supra*: "We think the proper construction here is to hold that by virtue of the express declaration of the statute, the bonds in question are not valid and binding until the conditions named shall have been complied with," and that no tax can be collected to pay interest on such bonds, though they may be in the hands of innocent holders.

The decree of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

WALL, J. I do not concur in the foregoing opinion.

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THE PEOPLE, use, etc.

V.

THOMAS A. WILSON.

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1. EVIDENCE—THINGS JUDICIALLY NOTICED.—Courts will take judicial notice of the charter or incorporating act of a municipal corporation, without it being specially pleaded, not only when it is declared to be a public act, but when it is public or general in its nature. So, where the original charter of a town provided that it should take effect when accepted by a vote of the citizens, and an amendatory act was subsequently passed, wherein the incorporation of the town was expressly referred to, the latter act being declared to be a public act, it was held that the charter granted by the original act was virtually declared to have been accepted by the citizens of the town, and of this courts would take judicial notice.

2. AVERMENT OF INCORPORATION.—An averment in the declaration that the appellee was collector of the town of H., and as such collector received the collector's books and did collect the taxes extended on the books of said town against persons residing *within the incorporate limits of the town of F.*, is a sufficient averment, on demurrer, that the town was possessed of corporate powers.

3. HIGHWAY TAX—TO WHOM PAID.—The tax for road purposes levied upon property within the limits of corporations, under the provisions of the second clause of Section 81, Chap. 121, Rev. Stat. should be paid over to the treasurer of such village. The phrase "tax levied for road purposes," includes all taxes collected for the payment of damages arising from opening and laying out roads, the purchase of materials for constructing and repairing roads and bridges, etc., as well as that "for the making and repairing of roads only."

APPEAL from the County Court of Clay county; the Hon. W. P. MURPHY, Judge, presiding.

Mr. RUFUS COPE, for appellant; as to the incorporation of the town, cited Private Laws, 1867, Vol. 3, 421; Private Laws, 1869, Vol. 4, 284.

That the inhabitants of such town are exempt from working on the roads: Private Laws, Vol. 3, 427.

The tax collected on property within the village should be paid over to the treasurer of the village: Laws of 1877, Act in regard to Roads and Bridges, §§ 81, 82, 83, 84; Baird v. The People, 83 Ill. 387; Rev. Stat. 916, §§ 17, 18, 43; Rev. Stat. 932, § 120.

MR. B. B. SMITH and MR. G. A. HOFF, for appellee.

TANNER, P. J. This was an action of debt, instituted in the name of the People of the State of Illinois to the use of the town of Flora, against the appellee on his official bond, as township collector of revenue. The sufficiency of the declaration was questioned upon general demurrer, in two respects. First: that it did not aver that the town had ever become incorporated. By an act of the General Assembly, in force February 27th, 1867, P. L. 23, p. 421, a special charter was granted to the inhabitants of the town of Flora, which was to become operative only upon being submitted to a vote of the citizens of the town. The act itself did not confer corporate powers, but enabled the citizens to acquire such at their election, in the manner specified in the act. This was declared to be a public act. We find, however, that the General Assembly in 1869, P. L. 24, p. 284, passed an act amendatory of the act to incorporate the town of Flora, in force February 27th, 1867, in which the acceptance of the charter is clearly recognized. The 2nd section of the amendatory act provides that "all taxes heretofore levied by the incorporate authorities of said town remaining unpaid, shall be due and payable, and the town clerk of said town shall certify to the county clerk of Clay county all such taxes as appear by the records of said town to be unpaid; and said county clerk shall thereupon extend the same upon the tax books of the town of Harter, to be collected as other taxes: and all contracts or obligations heretofore entered into by or with the town of Flora, and all transactions under and by virtue of the charter or ordinances of said town, shall be valid and binding as though the boundaries thereof had been correctly described in said act of incorporation; and all ordinances of the town of Flora shall be and remain in force in said town as above described, until repealed according to law." Section seven declares the amendatory act to be a public act, and to be in force from and after its passage. Thus the charter granted by the original act was virtually declared to have been accepted by the "citizens" of the town of Flora; and of this fact the courts were required to take judicial notice. "Courts will take

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judicial notice of the charter or incorporating act of a municipal corporation without being specially pleaded, not only when it is declared to be a public statute, but when it is public or general in its nature or purposes, though there be no express provision to that effect." Dillon on Mun. Cor. Sec. 50. "Courts are bound *ex officio* to take notice of public acts without being fully set forth, to give them full effect so soon as they are called to their attention." Sedg. St. and Const. Law, 34. We are therefore of the opinion that the pleader was not required to aver the existence of the corporation.

But aside from this view, we think the declaration contains a substantial averment that the town was incorporated. It avers that the appellee was collector of the town of Harter, in Clay county, and as such had given bond and entered upon the discharge of his duties; as such received the collector's books, and did collect the taxes extended on the books of said town, against persons residing within the incorporate limits of the town of Flora. These facts are admitted by the demurrer, and they are equivalent to an averment that the town was possessed of corporate powers. We next approach a question also raised by the demurrer, of greater difficulty, perhaps, and the main one involved in this controversy. Should the tax collected under and by virtue of the 2nd clause of the 81st section of the act in relation to roads and bridges in counties under township organization, in force July 1st, 1877, be paid to the treasurer of the commissioners of highways; or should so much thereof as is raised from property existing within the corporate limits of towns and cities having charge of the improvement of bridges, streets and alleys therein, be paid over to the treasurer of such towns and cities? This question was raised and settled adversely to the position of the appellee in this case, in *Baird v. The People*, etc. 83 Ills. 387. And unless the law has undergone a change in this respect, the construction there given in the act then in force, will be decisive of the case before us. The act now in force is a complete revision of Chap. 121, R. S. 1874, so far as relates to counties under township organization; and the first and second clauses of Sec. 81 of the present act, with some

changes, compose Secs. 16 and 120 respectively, of the former act. It is not urged that the second clause of Sec. 81 changes Sec. 120 of the old act, so as to bear materially upon the point raised. But it is insisted, in substance, that the changes made in Sec. 16, in forming the first clause of Sec. 81, and applying Sec. 84 of the present act, it then becomes manifest that the General Assembly designed to change the law as expounded in Baird's case. To ascertain what force there is in this view, we give Sec. 16 and the first clause of sec. 81 in full:

Sec. 16. "The commissioners of highways shall assess a road tax on all real and personal property liable to taxation of the town, to any amount they may deem necessary, not exceeding forty cents on each one hundred dollars worth, as valued on the assessment roll of the previous year: *provided*, that the tax on property lying within any incorporated village, town or city in which the streets and alleys are under the care of the corporation, shall be paid over to the treasurer of such village, town or city, to be appropriated to the improvement of roads, streets and bridges, under the direction of the corporate authorities."

First clause §81:

"*First*. The commissioners of highways of each town shall annually ascertain, as near as practicable, how much money must be raised by tax on real and personal property for the making and repairing of roads only, to any amount they may deem necessary, not exceeding forty cents on the one hundred dollars' worth, as valued by the assessment roll of the previous year, and certify the same as hereinafter provided: *Provided*, That the tax on the property levied for road purposes, lying within an incorporated village, town or city, in which the streets and alleys are under the care of the corporation, shall be paid over to the treasurer of such village, town or city, to be appropriated to the improvement of the roads, streets and bridges, either within or without said village, town or city, and within the township, under the direction of the corporate authorities of such village, town or city: *Provided*, further, that when any of said tax is expended beyond the limits of said village, town or city, it shall be with the consent of the road commissioners of the township."

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The changes which we deem necessary to notice are that where § 16 provided for levying a "road tax," and that the tax on property lying within incorporated towns and cities should be paid to the treasurers of such towns and cities. The first clause of § 81 provides for raising a tax for the "making and repairing roads only," and that the tax on property levied for road purposes lying within an incorporated town or city *

* * shall be paid to the treasurer of such town or city." By an examination of our system for working and keeping in repair the public roads, as developed by past legislation, it will be found that the phraseologies "road tax" and a tax for "making and repairing roads only," are identical in scope and meaning, and have reference to the ordinary working and repairing of roads. This view is not combatted.

But it is strenuously contended that the expression for "road purposes," has reference solely to the tax raised from property lying within the corporate limits of towns and cities, for the purpose of "making and repairing roads only," and therefore does not embrace any portion of the tax raised, by virtue of the 2nd clause of Sec. 81.

We have reached, after a careful examination of this view, a different conclusion. If the General Assembly had only designed that the tax assessed for the "making and repairing of roads only," should be paid to towns and cities in which the property existed from which the tax was raised, we are unable to discover the least reason for the change of the language of section 16 of the act repealed by the law now in force. Words more apt than those there used to express such intention cannot be found. After requiring the commissioners of highways to assess a road tax on all the real and personal property in the town or city, this proviso follows: "Provided that the tax on property lying within an incorporated town or city * * * shall be paid over to the treasurer of such town or city." As sections 16 and 120 of the former act were wholly independent of each other, the only tax that could have been paid to the town or city treasurers, under the proviso of section 16, was that which was denominated "a road tax," in the first part of the section. In Baird's case it was held that the tax raised

under section 120 of the act, from property lying within incorporated towns and cities, should be paid to the treasurers of such towns and cities, as well as that raised under section 16 of the act then in force. As already stated, these two sections in the order observed in the old act, are united in the present act and form one section, and provide for collecting taxes for the same purposes and from the same sources. Then the phraseology of the proviso in the first part of the section was altered so as to become more comprehensive than it was in the repealed act, in order to embrace the tax raised under both clauses of the section. The phrase "the tax levied for road purposes," includes all taxes collected for the payment of damages arising from opening and laying out new roads, the purchase of materials for constructing and repairing roads and bridges, and of machinery for working upon the same, as well as that assessed and collected for the "making and repairing of roads only."

"A tax for the making and repairing of roads only," is a part of the tax collected for "road purposes," and although the first expression, in an abstract sense, may be considered quite as comprehensive as the second, the legislature has seen proper to give it a more circumscribed meaning. The expression "for road purposes," however, we hold comprehends every step towards the making and improving roads and bridges, as provided for in section 81, and it seems clear that the most comprehensive terms are used in the present act for the purpose of avoiding the necessity of judicial construction. Again, it seems, if the intention of the law-maker was that the taxes provided in the first and second clauses of section 81, should be paid respectively to the treasurers of towns and cities, and to the treasurers of the commissioners of highways, the law would have provided for a separate extension of such taxes on the tax books. But the whole of the tax to be collected under this section is certified in the aggregate by the supervisors to the county clerks, and they are required to extend such as one tax in a separate column against each tax-payer. There the collector pays over all the taxes collected for road purposes from property lying within incorporate towns and cities, to the treasurers

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thereof, and to the treasurers of the commissioners of highways all other taxes collected for road purposes. But by the construction placed upon the act by the appellee, the collector could not pay the money over, either to the treasurers of the commissioners of highways, or to those of the towns and cities, as the law would afford him no means for making a division, and determining the relative proportion belonging to each.

The 82nd section of the present act provides that the taxes shall be extended and collected the same as state and county taxes, and the 84th section provides that the tax so collected shall be paid to the treasurer of the commissioners of highways (except as provided in the first clause of section 817, this act). What is the proviso of the first clause? Why, that all taxes collected from property lying within incorporated towns and cities for "road purposes," shall be paid over to the treasurers thereof.

In *Baird v. The People*, the court, in deciding the question, remark: "There is, it is true, in this an apparent incongruity, and it may be injustice, but we do not feel called upon to discuss either its wisdom or justice, but leave these for the consideration of the legislature."

It is doubtless difficult to distribute equally the burdens of creating and keeping up public highways between the citizens of towns and cities and those who are not, and we are unable to perceive that the construction for which the appellee contends, would produce less hardship and injustice than the law as it was settled in this case. Perhaps to meet this view of the case the legislature so amended the former law by the present act, as to provide that the money collected and paid over to villages, cities and towns, might be expended on highways beyond, as well as within their corporate limits. The charter of the town of Flora imposes on it the duty of keeping up its streets and alleys, and exempts its citizens from performing labor on roads outside of its corporate limits, or paying any money therefor. The 166 Sec. Chap. 121, R. S. 1874, declares that in no town or city incorporated under general or special law, shall the citizens thereof be required to contribute labor or money on property within the corporation, for the improve-

Lueken et al. v. The People.

ment of roads in the county, different from that required in the charter; but they are required to work and pay a tax to improve the streets and roads, and such improvements as are specified in the charter, or within the limits of the corporation, so long as the charter or incorporation shall remain in force. This section has been in force for more than thirty years, and it clearly shows that the settled policy of our State is not to impose upon the citizens of incorporated towns and cities the duty of maintaining the roads and highways without, as well as within such towns and cities. It is true that this rule may in some instances impose a seemingly unjust hardship upon the inhabitants of the town who do not reside within the corporate limits of towns and cities existing therein; but a contrary rule would in more instances create greater hardship and injustice to the citizens of towns and cities which are charged with the duty of keeping the streets and alleys thereof in repair. We think the Circuit Court erred in holding the appellants' declaration insufficient in law, and in rendering judgment against them for costs. The judgment will be reversed and the cause remanded.

Reversed and remanded.

 ERNEST A. LUEKEN ET AL.

v.

THE PEOPLE, use, etc.

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111	214

SALE OF INTOXICATING LIQUOR—REMOTE CAUSE.—The bar-tender of appellant sold liquor to B, and an altercation arising, the bar-tender threw a glass at B. which missed him and injured appellee. *Held*, that the injury complained of is not in a legal sense the natural and proximate consequence of the alleged act of appellant in selling the liquor. That it is a matter of speculation whether the same injury would not have been sustained if defendant had not sold the liquor.

APPEAL from the County Court of Randolph county; the Hon. W. P. MURPHY, Judge, presiding.

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Mr. ABRAM G. GORDON and Mr. GEORGE L. RIESS, for appellant; that the damages claimed are too remote, cited *Shugart v. Egan*, 83 Ill. 56; *Fent v. T. P. & W. R. R. Co.* 59 Ill. 349; 2 *Greenleaf's Ev.* § 256; *Schmidt v. Mitchell*, 84 Ill. 201; *Cuff v. N. & N. Y. R. R. Co.* 25 N. Y. 17; *Fairbanks v. Kerr*, 70 Pa. St. 86.

The act providing for a recovery in cases of injury arising from the sale of intoxicating liquors, should be strictly construed: *Fentz v. Meadows*, 72 Ill. 540; *Edwards v. Hill*, 11 Ill. 23.

Messrs. JOHNSON & HORNER, for appellee; as to the right to recover, cited *Rev. Stat.* 1874, 439, § 9; *Horn v. Smith*, 77 Ill. 381; *Roth v. Eppy*, 80 Ill. 283; *Schmidt v. Mitchell*, 84 Ill. 195; *Dunvoy v. Blinn*, 11 Ohio St. 331; *Milford v. Clewell*, 21 Ohio St. 191.

The party is liable for the selling by his agent: *Mullinix v. The People*, 76 Ill. 211; *Keedy v. Howe*, 72 Ill. 133; *Riley v. State*, 43 Miss. 397; *Stevens v. The People*, 67 Ill. 587.

WALL, J. This was an action of debt, commenced at the January term, 1878, of the Randolph County Court, by appellee against appellants, on the saloon bond of E. A. Lueken. The declaration alleges that E. A. Lueken, on the 20th day of April, 1876, obtained a license from the president and board of trustees of the village of Kaskaskia, to keep a saloon from that date until April 20th, 1877, and that defendant entered into bond, etc. That during the time for which said license was issued the said Lueken sold and gave to one Frank Bevenue intoxicating liquor, whereby said Bevenue became intoxicated, and by reason of such intoxication entered into an altercation with one John Buatte, the bar-tender of said Lueken, and during such altercation said John Buatte threw a glass tumbler at Frank Bevenue, and missed Bevenue and struck Louis Lortz—the party for whose use this suit was commenced—on the head, whereby Lortz was greatly injured, etc.

Conceding that the evidence in this case supports the averments of the declaration, we are of the opinion that

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there is no cause of action. The injury complained of is not in a legal sense, the natural and proximate consequence of the alleged act of the defendant. A new force or power has intervened, of itself sufficient to stand for the cause of the mischief. It is essentially a matter of speculation whether the same injury would not have been sustained if the alleged act of the defendant in selling the liquor to Bevenue had not been committed. The defendant could hardly be presumed to have foreseen that his act of selling the liquor would have produced or been followed by the altercation in which a stroke aimed at Bevenue would fall upon the plaintiff, and therefore he cannot be held responsible. *Fent v. T. P. & W. R. R. Co.* 59 Ill. 349; *Shugart v. Egan*, 83 Ill. 56.

The judgment must be reversed, and as there is no cause of action shown, the case will not be remanded.

Reversed.

EDWARD M. WEST ET AL.

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

PRACTICE—APPEAL FROM COUNTY COURT—WHEN TO APPELLATE COURT.
—A suit under the statute to recover the amount of tax due upon forfeited real estate, is a common law action within the meaning of the statute requiring appeals from the county court in common law actions to be taken to the Appellate Court.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. KROME & HADLEY, for appellants; contending that the appeal should have been to the Appellate Court, cited Rev. Stat. 1877, Chap. 37, §§ 122, 123.

The title to the lands was not in appellants at the time of the assessment. The title derived by sale under execution was void, because the premises were exempt as a homestead:

West et al. v. The People.

Green v. Marks, 25 Ill. 221; Stevenson v. Marony, 29 Ill. 532; Fishback v. Lane, 36 Ill. 437; Wiggins v. Chance, 54 Ill. 175.

Appellants were liable personally only for taxes levied after they became owners of the land: Rev. Stat. Chap. 120, § 59; Atlantic R. R. Co. v. Cleins, 2 Dillon, 175; County Com'rs v. Claggett, 31 Mo. 210; Cooley on Taxation, 303.

No report of the collector and notice of application for judgment were made, and the county court had no jurisdiction: Spellman v. Curtenius, 12 Ill. 409; Picket v. Hartsock, 15 Ill. 282; Morgan v. Camp, 16 Ill. 175; Chiniquy v. The People, 78 Ill. 570.

MR. CYRUS L. COOK and MESSRS. WISE & DAVIS, for appellee.

WALL, J. This was an action of debt, commenced by the appellees against the appellants, in the County Court of Madison county, to the August term, 1878, to recover the amount due upon certain real estate alleged to have been forfeited to the State. In the county court judgment was rendered against the appellants for \$88.88, from which an appeal was taken by the appellees to the Circuit Court. In the Circuit Court the appellants moved to dismiss the appeal, which motion was by the court overruled, and the case proceeded to trial, resulting in a judgment in favor of the appellees for \$632.46. The case is brought here by appeal, and various errors are assigned, only one of which we propose now to consider. Was the appeal properly taken to the Circuit Court? Chapter 37, section 122, Rev. Stat. provides that "appeals may be taken from the final orders, judgments and decrees of the county courts to the circuit courts of their respective counties in all matters, except as provided in the following section, upon appellant giving bond, etc., except as otherwise provided by law. Upon such appeal the case shall be tried *de novo*." The following section, 123, provides that "appeals and writs of error may be taken and prosecuted from the final orders, judgments and decrees of the County Court to the Supreme Court, or Appellate Court, should such a court be established by law, in proceedings for the sale of lands for taxes and special assessments;

and in all common law and attachment cases, and cases of forcible detainer and forcible entry and detainer.”

It is urged that the term common law cases, as here used, refers not to the form of action, but to the nature and origin of the right. If the right or cause of action is statutory, and was unknown at common law, then it is said the term does not apply. We think this is not the true construction. If there is any doubt or ambiguity as to the meaning of the words, it is proper to adopt that construction which gives to the language the significance ordinarily attached to it. When a statute is remedial, such a construction should obtain as will promote the remedy and hasten the process of litigation. Public policy requires a speedy adjustment of legal controversies, and abhors ambiguity and uncertainty in the laws. It would often be difficult to say whether a given cause of action was recognized fully or at all, at common law. Legislation has so greatly changed the rights and liabilities of persons that in many cases it would be a matter of grave doubt and vexatious controversy whether the alleged right or liability existed independently of the statute. For example, many of the questions growing out of the making and endorsing of commercial paper, the relations of guarantors and sureties, husband and wife, and various other instances where common law and statutory rights and liabilities are more or less blended and combined.

In order to determine where an appeal must go, it would be necessary to examine the whole record with much care and research, and thus needless and profitless discussion and delay would ensue. On the other hand, if we are to look only to the form of action, no such doubt or ambiguity need arise. Common law cases being such cases as appear in the common law forms of action, are easy of recognition. Those forms are familiar to the practitioner, and a glance will settle the character of the action. The fact that a common law remedy is applied to the recovery of a statutory penalty, or the enforcement of a statutory liability, can make no difference. This view derives force from the context—“and in all common law and attachment cases.” A common law suit, for example—debt—may be

Smith v. The People.

brought to recover a common law right; it may also be brought to recover under a statute. On the other hand, an "attachment case," which is a statutory proceeding, may be brought to recover a common law right as well as a right arising under a statute. It seems clear that the legislature in using the term common law cases, referred to the form of action, and used it in its broadest and most comprehensive sense, and as we have said before, that is a fair construction which will avoid as far as possible all doubt or ambiguity, and at the same time promote the remedy and shorten the course of litigation.

Our conclusion is, that the appeal was not properly taken to the Circuit Court.

The judgment is reversed and the cause remanded.

Reversed.

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IRWIN Z. SMITH

V.

THE PEOPLE OF THE STATE OF ILLINOIS.

1. RECOVERY OF TAXES DUE ON FORFEITED PROPERTY.—The statute providing that suit may be brought against the owner for the amount of tax due upon forfeited property, is not in conflict with the provisions of the Constitution.

2. FORFEITURE NECESSARY.—In order to support a personal action for such tax, there must first be a forfeiture, and all the steps necessary to produce a forfeiture must have been taken. There must have been a process of sale, and a failure to sell for want of bidders, and the absence of one of these essential requisites renders the forfeiture invalid, and all proceedings based upon the forfeiture are void.

3. EVIDENCE—DEEDS.—It was competent to give in evidence deeds tending to show that the defendant was the owner of the land.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. GILLESPIE & HAPPY, for appellant; that the act is unconstitutional, cited *Andrews v. The People*, 75 Ill. 605; Constitution of 1870, Chap. 9, §§ 4, 5.

Only the officer authorized to receive the State and county tax has authority to sell land for taxes: *Hills v. Chicago*, 60 Ill. 86.

To create a personal liability there must be an ownership of the property on the first day of May of the year for which the tax is sought to be collected: *Rev. Stat. 1877*, 868, § 59.

There must be proper notice before there can be a legal judgment of forfeiture: *People v. Otis*, 74 Ill. 384; *Chiniquy v. The People*, 78 Ill. 570; *Fortman v. Ruggles*, 58 Ill. 207.

Mr. C. L. Cook and Messrs. WISE & DAVIS, for appellee; as to what are taxes, cited *Cooley on Taxation*, 1; 58 Me. 591; *Hilbrel v. Catherman*, 64 Pa. St. 154; *Blackwell on Tax Titles*, 1; *Perry v. Washburn*, 20 Cal. 318; *Hanson v. Vernon*, 27 Iowa, 28.

As to the object of taxes: *Cooley on Taxation*, 2; *People v. Brooklyn*, 4 N. Y. 419; *McKune v. Del. Canal Co.* 49 Pa. St. 524; *Thatcher v. The People*, 79 Ill. 597.

Upon the right to impose taxes: 18 Pa. St. 26; *Bank of Pennsylvania v. Commonwealth*, 19 Pa. 144; *Catlin v. Hull*, 21 Vt. 152; *Blue Jacket v. Johnson Co.* 3 Kan. 299; *Hager v. Supervisors of Yolo*, 47 Cal. 222; *Corte v. Soc'y for Savings*, 32 Conn. 173; *Porter v. R. R. I. & St. L. R. R. Co.* 76 Ill. 561; *Enrigh v. The People*, 79 Ill. 214.

The right to tax rests upon a necessity, and the burden is upon him who alleges it, to show wherein the Act violates the Constitution: *Porter v. R. R. I. & St. L. R. R. Co.* 76 Ill. 561; *Sawyer v. City of Alton*, 3 Scam. 127; *People v. Worthington*, 21 Ill. 177; *People v. Salomon*, 51 Ill. 38; *McVeagh v. Chicago*, 49 Ill. 318; *McCulloch v. Maryland*, 4 Wheat. 428; *Providence Bank v. Billings*, 4 Pet. 561; *People v. Mayor, etc.* 4 Com. 425.

Taxes may be collected by suit: *Cooley on Taxation*, 299; *Ryan v. Gallatin Co.* 14 Ill. 78; *Dunlop v. Gallatin Co.* 15 Ill. 7; *Geneva v. Cole*, 61 Ill. 397.

In construing the Constitution the whole of the Revenue Act must be regarded, and not isolated sections: *Cooley on Con. Lim.* 57; *Belleville R. R. Co. v. Gregory*, 15 Ill. 20.

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Mere technical objections will not defeat the judgment of forfeiture: *Thatcher v. The People*, 79 Ill. 597; *Beers v. The People*, 83 Ill. 488; *Chiniguy v. The People*, 78 Ill. 570; *Pur-rington v. The People*, 79 Ill. 11; *People v. Brislin*, 80 Ill. 423; *Lehmer v. The People*, 80 Ill. 601.

WALL, J. This was an action of debt, brought by appellee against appellant, under the 230th section of the revised statutes, entitled revenue, which is as follows:

"The county board may, at any time, institute suit in an action of debt, in the name of the people of the State of Illinois, in any court of competent jurisdiction, for the amount due on forfeited property." It is urged that the declaration is not sufficient. We have examined it and are of opinion that it is substantially good. It is objected that the statute upon which the suit is brought is unconstitutional. The power of taxation is an incident of sovereignty and co-extensive with it. It is essential to the support of government, and to the existence of civilized society. Aside from the general limitation that it can be exercised only for public purposes, the power is uncontrolled save by the Constitution. The process of collection may be adapted to the condition of things, and may be such as the legislature deems necessary and proper, by proceedings *in rem* or *in personam*; the ordinary remedies being by suit, by distress and sale of personalty, and by sale of lands.

In considering the question of a constitutional limitation upon legislative power in this respect, the rules ordinarily applicable are enforced. It is argued that a limitation upon this power sufficient to invalidate § 230, above quoted, must be inferred from the provisions of §§ 4 and 5, Art. 9, of the Constitution of 1870, entitled "Revenue." Those sections are as follows:

"Sec. 4. The General Assembly shall provide, in all cases where it may be necessary to sell real estate for the non-payment of taxes or special assessments for State, county, municipal or other purposes, that a return of such unpaid taxes or assessments shall be made to some general officer of the county having the authority to receive State and county taxes,

and there shall be no sale of said property for any of said taxes or assessments, but by said officer upon the order or judgment of some court of record.

“Sec. 5. The right of redemption from all sales of real estate for the non-payment of taxes or special assessments of any character whatever, shall exist in favor of owners and persons interested in such real estate, for a period of not less than two years from such sales thereof. And the General Assembly shall provide by law for reasonable notice to be given to the owner or parties interested, by publication or otherwise, of the fact of the sale of the property for such taxes or assessments, and when the time of redemption shall expire: *Provided*, that occupants shall, in all cases, be served with personal notice before the time of redemption expires.”

Considering these provisions in the light of the rules first announced, is the point well taken? It must be remembered that the legislature may adopt such modes of collection as may seem most efficient, including of course ordinary actions *in personam*, to recover the amount due. These sections of the Constitution only refer to the sale and redemption of real estate. They do not, in terms or by implication, limit the legislative power as to any other mode of collection. They evidently refer only to such sales when made under and by virtue of direct proceedings against real property for the collection of taxes in which proceedings are *in rem*. They do not refer to the mode pursued in this case, and though it may happen that a judgment *in personam* having been obtained, land may be sold, and the time of redemption may expire within two years, yet we think these provisions are in no wise contravened.

We are aware of no rule of construction that would require us to hold, because the constitution contains one or more limitations as to the exercise of one mode of collection, that therefore it must be implied no other mode of collection can be resorted to. The Constitution of 1848 contained a provision, Sec. 4, Art. 9, upon the subject of sales of land for taxes, but it was never supposed that the State had no other remedy. On the contrary, the remedy by suit was repeatedly recognized. *Ryan v. Gallatin Co.* 14 Ill. 78; *Dunlap v. Gallatin Co.* 15 Ill. 7;

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The Town of Geneva v. Cole, 61 Ill. 398. The case of Andrews v. The People, 75 Ill. 605, cited by counsel for appellant, is to the same effect. In that case the act of 1872 was involved. This act, passed under the present Constitution, authorized a personal action in debt or assumpsit for the recovery of taxes, and the objection taken by the court was not that there was no warrant for such a law, but that while the law provided that the remedy should be cumulative, it did not provide that while this remedy was being pursued another remedy might be enforced for the same purpose. If the statute had so provided there would have been no constitutional objection. In the case at bar such an objection cannot obtain, for the obvious reason that the proceeding is strictly in pursuance of the statute. The statute authorizes a suit to recover the amount due on forfeited property, and the remedy *in personam* begins where the proceedings *in rem*, having failed to collect the tax, determine. The forfeiture must first occur, then the suit to recover the sum due thereon. We are clearly of opinion that there is no constitutional objection to the statute.

It is objected that the court erred in admitting in evidence certain deeds, offered for the purpose of showing that defendant was the owner of the land. This proof tended to establish the case made by the declaration, and was competent. The next question is, does the record show such a forfeiture as will authorize a recovery? The statute provides a remedy by suit against the person for the amount due upon forfeited property. It is manifest, in our opinion, that there must have been a valid forfeiture. To constitute a valid forfeiture, all of the steps provided by the statute must have been substantially complied with. There must have been a notice substantially such as the law requires. This notice is jurisdictional. There must have been a judgment, a process of sale, an offer of sale by the proper officer, and a failure to sell for want of bidders. Scott v. The People, etc. 2 Bradwell, 642. A question is made upon the notice. From the record as it is before us, we are at a loss to say what the notice really contained, and passing that question, we find a judgment valid, so far as we can see, if the proper notice was given. The record however

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fails to show a process of sale, as required by Sec. 194. As we read the statute, this process is essential to a valid sale and to a valid forfeiture for want of bidders, and the absence of this essential requisite renders invalid the subsequent proceedings. It is the warrant upon which the officer acts in making the sale, and is indispensable. The point is made that the defendant tendered the amount due on the land he really owned. We think this objection is not valid. The tender, if any was made, was not kept good. For the want of the process of sale, as required by section 194, we think the record does not sustain the judgment. Judgment reversed and cause remanded.

Reversed.

GUSTAVE VETTER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

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1. **SUIT FOR TAX ON FORFEITED PROPERTY—WHAT MUST BE SHOWN.**—To warrant a recovery in a suit under the statute, for the amount of tax due on forfeited property, the plaintiff must show that there had been a notice, a judgment, a process issued for the sale of the property, an offer and a failure to sell for want of bidders.

2. **FAILURE TO SHOW PROCESS.**—Without proof that such process as the statute requires was issued, there can be no sale or offer to sell the property that would bind anybody interested.

APPEAL from the Circuit Court of Madison county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

MESSRS. KROME & HADLEY, for appellant; as to what is necessary to prove a forfeiture, cited *Scott v. The People*, 2 Bradwell, 642.

There can be no personal liability for taxes of previous years, levied before appellant became the owner: *Rev. Stat. Chap. 120 § 59*; *Cooley on Taxation*, 303; *Atlantic R. R. Co. v. Clines*, 2 Dillon, 175; *Commissioners v. Claggett*, 31 Md. 210.

The steps required by statute to create a forfeiture are all

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essential to give the court jurisdiction, and must be shown: Spellman v. Curtenius, 12 Ill. 409; Pickett v. Hartsock, 15 Ill. 279; Morgan v. Camp, 16 Ill. 175; Chiniquy v. The People, 78 Ill. 570.

MR. CYRUS L. COOK and Messrs. WISE & DAVIS, for appellee.

ALLEN, J. This was a suit brought by appellees against appellant, to the October term of the Madison Circuit Court, A. D. 1878, for the recovery of an amount due on certain lands forfeited to the State, for the non-payment of taxes.

Under Sec. 230, Chap. 120, Revised Statutes, 1874, "The county board may at any time institute suit in an action of debt, in the name of the people of the State of Illinois, in any court of competent jurisdiction, for the amount due on forfeited property."

The declaration was in debt for \$1,386.08; to which a demurrer was filed by defendant. The demurrer was overruled by the court, and one of the errors assigned is the overruling of the demurrer by the court. Our examination of the declaration satisfies us that the demurrer was properly overruled. To entitle the appellees to recover under this declaration, it was necessary that they should show the amount due, and that the property had been forfeited, and that the necessary steps to work a forfeiture had been taken. To create a forfeiture there must have been a notice, a judgment, a process, issued for the sale of the property, an offer of the property for sale, and a failure to sell for want of bidders.

In this record there is no process shown upon which the land was offered for sale by the collector. The 194th section of the revenue act requires the clerk "before the day of sale to make a record of the lands and lots against which judgment is rendered, which shall set forth the owner's name, if known, a description of the property, total amount of judgment on each tract or lot, the year or years for which the same is due, etc. etc., to which the order of court shall be attached, and his certificate that such record is correct, and that this record shall be the process on which such property shall be sold, etc. etc. An

examination of this record fails to show any such process issued by the clerk to the collector, without which there could be no sale or offer to sell that would bind any one in interest."

The collector would be as powerless to sell and convey as would a sheriff to sell to satisfy a judgment without an execution, and however regular every other step in the proceeding may have been, the failure to show a process on which an offer was made, must be fatal to a recovery. Appellee in his brief insists that there was a precept. Appellee introduced Judgment Book H, page 51, which shows application for judgment on out lot No. 6, and then that part of Book B showing forfeiture. The only thing that appears in this record on the subject of a process is in the testimony of W. H. Hall, a witness called by appellant, who when shown a paper and asked what paper it was, answered: "That is a precept of the tax sale of 1878." This paper was not introduced in evidence, so far as the record shows, nor does the record disclose its contents. There seems to have been an advertisement attached to it, which Hall says was before the County Court when judgment was rendered. And this is all we find in the entire record on that subject. Whether the paper referred to contained any of the essential requisites of a process we cannot determine, as it does not seem to have been read before the court at all. With our view of the necessity of showing a process on which this forfeited lot was offered for sale, we deem it unnecessary to enter into the discussion of several other errors assigned. This cause was submitted to the judge without the intervention of a jury. A motion was made in arrest of judgment, which was overruled, and judgment rendered for appellees for \$1386.08 and cost. We regard the evidence as insufficient to authorize the judgment, hence we reverse and remand the cause.

Reversed and remanded.

Crotty v. Wyatt.

PATRICK J. CROTTY

v.

JAMES H. WYATT.

1. PRACTICE—RETURNING VERDICT—POLLING JURY.—The verdict of a jury must be returned in open court by the entire panel, and either party has the undoubted right to have the jurors called individually, and inquire as to whether the verdict returned is his verdict. A verdict is not final until pronounced in open court and recorded.

2. SEALED VERDICT.—A direction to the jury to seal up their verdict and separate, does not dispense with their personal attendance in court when the verdict is opened, or deprive either party of the right of polling the jury.

3. RULE OF COURT—CANNOT DEPRIVE PARTY OF LEGAL RIGHT.—The court, by virtue of power conferred to establish rules for the dispatch of business, cannot by such rules deprive a party of a well established legal right, unless it had in some manner been forfeited under such rules.

APPEAL from the City Court of East St. Louis; the Hon. CHARLES T. WARE, Judge, presiding.

Messrs. HALBERT & GREEN, for appellant; that a court may change the form of a verdict, but not in substance, cited *Brown v. Rounsavell*, 78 Ill. 589; *City of Pekin v. Winkel*, 77 Ill. 56.

Messrs. FLANNIGAN & CANBY, for appellee; that objections to rulings of the court on questions of evidence must be preserved by exceptions, cited *Sawyer v. City of Alton*, 3 Scam, 127; *Smith v. Kahill*, 17 Ill. 67; *Board of Education v. Greenebaum*, 39 Ill. 610; *Allen v. Payne*, 45 Ill. 339; *Reynolds v. Palmer*, 70 Ill. 288; *Wilkinson v. Deming*, 80 Ill. 342.

A proposition for a compromise of a claim is not binding unless accepted: *Paulin v. Howser*, 63 Ill. 312; *Burroughs v. Clancey*, 53 Ill. 30.

Claims acquired after suit begun cannot be set-off: *Pettes v. Westlake*, 3 Scam. 536; *Kelly v. Garrett*, 1 Gilm. 649.

As to the power of courts to establish rules of practice: *Owens v. Ranstead*, 22 Ill. 161.

A court may reject a portion of a verdict as surplusage, and

render judgment on the remainder: *O'Brien v. Palmer*, 49 Ill. 72.

The division of costs by the jury may be rejected by the court as surplusage: *Bacon v. Callender*, 6 Mass. 303; *Lincoln v. Hapgood*, 11 Mass. 358.

TANNER, P. J. This is an appeal from the city court of east St. Louis. The record shows that the cause was submitted to a jury; that they agreed upon a verdict, sealed it, and handed the same to the sheriff, and were by him discharged. The verdict was delivered to the court, and then announced in open court, without the jurors having been called; the appellant upon the announcement and publication of the verdict, moved the court to have the jury called by names, but the court denied the motion, had the verdict recorded and entered judgment thereon. To this the appellant excepted. He now brings the cause to this court, and assigns for error, the refusal of the court to allow the jurors to be called. Where matters are submitted to a jury their verdict must be returned in open court by the entire panel, and when the same is pronounced, the parties have the undoubted right to have the jurors called individually, and to inquire of each one as to whether the pronounced verdict is his verdict. This course is termed in law, polling the jury. A verdict is not final until pronounced in open court and recorded; and until this is done, either party has the right to poll the jury. It is not less so when the verdict is brought in sealed, than when verbally announced by the foreman. A direction to the jury to seal up their verdict and separate, does not dispense with their personal attendance in court when the verdict is opened, and if any of them dissent their verdict cannot be recorded. *Nomaque v. The People*, Breese; 145; 2 Gilm. 546; *Johnson v. Howe*, 2 Gilm. 342; *Martin v. Morelock*, 32 Ill. 485. The counsel for appellee insists that the court was empowered to disregard the motion for leave to have the jury polled by virtue of a rule of practice established by the court. As to this rule we know nothing, as it is not found in the record. Still the court, by virtue of a power conferred to establish rules of practice to facilitate the dispatch of

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business, could not by such rules deprive a party of a well established legal right, unless it had been forfeited in some manner under such rules. In the record before us, we find no evidence of *laches* or dereliction on the part of appellant. For the error of the court in this respect, the judgment will be reversed and the cause remanded.

Reversed and remanded.

JOHN FLEMING

v.

FRED HIOB ET AL.

CONVEYANCE TO DEFRAUD CREDITORS—EVIDENCE.—The case is reversed by reason of the insufficiency of the evidence to establish the *bona fides* of the conveyance from father to son. It appearing that father and son lived together, the father, being in debt, conveyed all his property to his son, a young man without means, for an expressed consideration of three thousand dollars, no payment or means of payment being shown.

ERROR to the Circuit Court of Randolph county; the Hon. AMOS WATTS, Judge, presiding.

MESSRS. JOHNSON & HORNER, for plaintiff in error; that a fraudulent intent was clearly shown, cited Bump on Fraudulent Conveyances, 79; Letcher et al. v. Morrison, 27 Ill. 209; Brown et al. v. Welch, 18 Ill. 343; Bispham's Principles of Equity, § 267.

The court should have granted a new trial on the ground of newly discovered evidence: Cowan v. Smith, 35 Ill. 416; T. W. & W. R. R. Co. v. Ingram, 85 Ill. 172; Cochran v. Ammon, 16 Ill. 316.

MR. SILAS L. BRYAN and MESSRS. POLLOCK & SON, for defendants in error; that the motion for new trial was not accompanied by affidavits of the witnesses, and hence was properly denied, cited Cowan v. Smith, 35 Ill. 416; T. W. & W. R. R. Co. v. Ingram, 85 Ill. 173; Emory v. Addis, 71 Ill. 273.

A new trial will not be granted where the evidence offered is merely cumulative or impeaching: *Fuller v. Little*, 69 Ill. 229; *Hall et al. v. Fullerton*, 69 Ill. 448; *Knickerbocker Ins. Co. v. Gould et al.* 80 Ill. 388; *McKenzie v. Remington*, 78 Ill. 388.

An affidavit setting up newly discovered evidence must state that it is true: *Murphy v. McGrath et al.* 79 Ill. 494; *Ritchey v. West*, 23 Ill. 385.

When a transfer is made for a valuable consideration, there must be a fraudulent intent on the part of both vendor and vendee to render it void: *Bump on Fraudulent Conveyances*, 227.

Mere knowledge by the vendee of a fraudulent intent on the part of the vendor will not affect the vendee's rights: *Bump on Fraudulent Conveyances*, 233.

Proof must be clear and convincing that both parties participated in the fraud: *Bump on Fraudulent Conveyances*, 238; *Terrell et al. v. Green et al.* 11 Ala. 207; *Hatch et al. v. Jordon*, 74 Ill. 414; *Jewett v. Cook*, 81 Ill. 260.

Where an act can be traced to an honest source equally as well as a corrupt one, no fraud will be presumed: *Bowden v. Bowden*, 75 Ill. 143.

A verdict will not be disturbed unless manifestly against the weight of evidence: *C. & N. W. R. R. Co. v. Ryan*. 70 Ill. 211; *Chapman v. Burt*, 77 Ill. 337.

A new trial will not be awarded if the evidence tends to sustain the verdict, although the court would have found differently: *Gilbert v. Bone*, 79 Ill. 341; *Varner v. Varner*, 69 Ill. 443; *Kightlinger v. Egan*, 75 Ill. 141; *Edgmon v. Ashelby*, 76 Ill. 161.

ALLEN, J. Ernst Hiob filed his bill to the September term of the Randolph Circuit Court, 1877, against John Fleming and Daniel Gerloch, alleging that he is the owner of the east half of southwest one-fourth of section three, town six, south range six, west, lying in Randolph county. That he derived title from Frederick Hiob under deed executed and delivered January 27th, 1876, and recorded same day. That said deed contained conveyance to some lots other than the

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land above described, and that the consideration paid for same was \$3,000; and further, that John Fleming, one of the defendants in the bill, obtained a judgment against Frederick Hiob and Fritz Lohrding at the March term of said court for 1877, for the sum of \$845.60. That upon said judgment execution issued 8th of August, 1877, and that the sheriff levied said execution on the land above described, and had advertised the same for sale under the execution, and was threatening to sell the same; alleges that he, defendant in error, is the only person having any interest in the same. That John Fleming and Daniel Gerloch were about to disturb him in the enjoyment of his land, and would do so unless enjoined. Upon this bill a temporary injunction was issued.

To this bill an answer was filed by plaintiffs in error, admitting the conveyance, but denying that it was made in good faith. To this answer replication was filed. John Fleming, plaintiff in error, then filed his cross-bill in the nature of a creditor's bill, setting up his judgment and levy, charging that conveyance to Ernst Hiob was made and received for the purpose of hindering plaintiff in the collecting his debt, and praying that the conveyance be set aside for fraud, and the land subjected to sale under his levy; that Frederick Hiob had no other property out of which to make his debt.

To this cross-bill Ernst Hiob answered, denying the fraud, etc. Default was had upon the cross-bill as against Frederick Hiob. On a hearing, the deed from Frederick Hiob to Ernst Hiob was introduced. Ernst Hiob testified that he purchased the land described in deed from Frederick Hiob, his father. "I paid for the land in full at the time I purchased." On cross-examination he said: "I did not pay anything for the land at the time I purchased it," but it is all paid now. I paid father \$500 in the year 1876, out of wheat crop, and \$400 out of crop of 1877. Two months ago I borrowed \$2,000 from Henry Bollinger, and with \$100 I paid residue of purchase money. I gave a mortgage on the lands and lots described in deed to my brother Gustave Hiob, for the three thousand dollars about one year ago. Gustave was to let me have the three thousand dollars when he could get it. I am Frederick Hiob's

son. I lived at home with my father until the fall of 1877. I knew when I purchased the land father owed a security debt, "but I did not know to whom he owed it. I bought everything father had." "I cleaned him out." Father wanted to quit farming. The purchase was not made to hinder the collection of debts of my father. I intended to take the three thousand dollars and pay father with it when my brother could raise it. I had no property of any kind when I bought father out. Father still resides on the lot in Randolph, where he lived before the sale. Has a blacksmith shop on the lot.

It was shown that Gustave Hiob, to whom defendant gave the mortgage, was wholly insolvent. He testifies himself he lives with his father; is 22 years old; didn't know when or how he was to get three thousand dollars to let Ernst have; had about \$100 when I took mortgage from brother; did not have all that in my possession. I released the mortgage about two weeks ago. Upon this evidence the Court made the injunction perpetual and dismissed the defendant's cross-bill; whereupon plaintiff in error moved for a new hearing, upon the ground of newly discovered testimony, and in support of his motion filed an affidavit for a new trial, showing that A. G. Gordon, the notary public before whom the deed of conveyance was acknowledged, would testify that at the making of said conveyance, as between father and son, the complainant (defendant in error) admitted and stated that said conveyance was made for the purpose of escaping the payment of the demand of the defendant (the plaintiff in error), and to place said land beyond the reach of the creditors of the said Frederick Hiob, the father and grantor of the complainant (defendant in error); "that said Gordon refuses to voluntarily make an affidavit to the facts set forth, but avers his readiness to testify to such facts when called as a witness, and that he understands that one Alexander Hord will testify to the same facts; that these facts have come to his knowledge since the trial of this cause." But the court refused to give plaintiff in error a new hearing, and the decree of the court dismissing plaintiff's cross-bill and making injunction on original bill perpetual, as also the refusal of the court to give

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plaintiff in error a re-hearing, are assigned for error. Ought the court to have made the defendant's injunction perpetual and to have dismissed plaintiff's cross-bill? These two questions blend themselves so together that in deciding one we necessarily determine the other. Here are father and son living in the same family; the father in debt; the son without means. The father transfers to his son all his lands; the house in which he lives; the shop in which he works; for a consideration of three thousand dollars; and when called upon to answer as to whether this transfer to his son was made in good faith, or with intent to defraud and cheat his creditors, stands mute, and without any apparent reason refuses to answer; and by his silence confesses his purpose in making the transfer to be fraudulent. If it were otherwise, his voice would have been heard in indignant denial. It may be said the purpose of the father in making the sale could not affect the rights of the son if he was an innocent purchaser, and that, although his subsequent conduct might be such as to warrant the conclusion that he was trying to hinder, delay or cheat his father's creditors, yet if at the time the purchase was made such intent did not exist, his title is not affected. As this cause will again be submitted, we do not desire to discuss the evidence of the son upon these questions. We think, under all the circumstances, the court ought to have granted the plaintiff in error a re-hearing. We are of opinion that justice has not been done by making the injunction perpetual, and for this reason the decree of the court is reversed and cause remanded.

Reversed and remanded.

DUQUOIN STAR COAL MINING COMPANY

v.

JOHN THORWELL.

1. CONTRACT FOR LABOR—DISCHARGE FOR INCOMPETENCY.—Where a servant or laborer is discharged from service for incompetency, he is entitled to recover only for wages due him up to the time of such dismissal. The

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testimony in this case proving conclusively the incompetency of appellee, the company had a right to discharge him, and a verdict in his favor for the amount of wages for the unexpired term cannot be supported.

2. INSTRUCTIONS—EVIDENCE AS TO DUTY OF EMPLOYEE.—An instruction that the only evidence as to the duties of an overseer or pit boss to be considered, is the by-laws of the company, relating to such duties, does not give a correct statement of the law, and is erroneous.

3. EVIDENCE OF PROCEEDINGS OF BOARD OF DIRECTORS.—It was erroneous to instruct the jury that if the articles of organization of the company required a written record to be kept of all proceedings of the board of directors, then, unless such a record is kept, oral evidence of the facts required to be kept could not be considered.

APPEAL from the Circuit Court of Perry county; the Hon. AMOS WATTS, Judge, presiding.

Mr. S. G. PARKS, for appellant.

Messrs. T. T. & D. W. FOUNTAIN, for appellee; that where the evidence is conflicting, the court will not disturb the verdict, cited *Evans v. Fisher*, 5 Gilm. 569; *Race v. Oldridge*, 11 Chicago Legal News, 169.

The appellant is a corporation, and can only exercise its functions in the manner authorized by its charter. *Metropolitan Bank v. Godfrey*, 23 Ill. 604.

ALLEN, J. This suit was brought by plaintiff against defendant in the Perry Circuit Court to the April term, A. D. 1878. Declaration charges that defendant was "pit boss" or foreman in plaintiff's mine; that he commenced his duties as such on the first day of February, 1877, and that he was discharged from the mine by plaintiff on the 6th of October, 1877, that he had supervision and control of the mines and the stock in the mine, and that by defendant's negligence, carelessness and want of skill, the plaintiff suffered damages to the amount of \$2,500. Defendant filed a plea of set-off. Upon a trial in the Circuit Court the jury found for the defendant, and assessed his damages at \$330. A motion for new trial was entered and overruled by the court. Defendant remitted \$130 and the court rendered judgment against the plaintiff for \$200 and costs.

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There were many witnesses examined for plaintiff on the trial, and some contradiction as to the want of skill displayed in the management of the mine by defendant, and some wild guessing at the damages the plaintiff sustained by defendant's negligence and disregard of duty while in control of the mine. From the drift of the testimony we are satisfied that plaintiff suffered some loss by reason of the want of skill or inattention to duty on the part of defendant; but how the jury arrived at their verdict or upon what testimony they found for the defendant the sum of \$330, we are at a loss to determine. The defendant testifies that a written notice to quit was served on him by the president of the company on the 9th of October, 1877; that he notified Henry Horn, superintendent, that he was willing to work, and that he should hold the company responsible for his wages; that he had not received any pay for services after September, 1877, but that he was satisfied with what he had received up to that time; so that for any actual services performed he was not entitled to more than one month's wages, at any rate. Whether he was entitled to the remainder of the year after he was discharged, must depend upon the question as to whether plaintiff had sufficient cause to justify his discharge.

We regard the evidence of his incapacity or negligence so overwhelming as to remove doubt on this question. Sixteen witnesses, miners, testify to his incapacity or negligence, and several of them show much feeling in the matter. We are not at liberty to disregard their evidence on the question of his incompetency or negligence. Against these witnesses we have the defendant, who contradicts the plaintiff's evidence on this point, and three or four others who speak from their observation of the management in and about the mine. We believe the jury could not disregard the plaintiff's evidence on the question of care and skill. If he lacked either he was unfit for the duties he had assumed, and plaintiff had a right to discharge him. If the plaintiff had a right to discharge him, then he was not entitled to compensation as pit boss after his discharge. The finding of the jury must have been based upon the theory that he was entitled to compensation till the end of the term. They would not have been warranted in allowing him more pay than

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he had received up till September, for he says he was satisfied with what he had received up to that date; although under his contract he may have been entitled to more pay than he actually received. If what he did receive he received in full satisfaction of his services, that foreclosed all inquiry as to whether he was entitled to more or not. It matters not in our judgment upon what theory the jury found for defendant the sum of \$330; the finding could not be supported by the evidence, and the verdict should have been set aside and a new trial awarded. Nor does the remittitur entered by the defendant of \$130, cure the error in the finding of the jury.

As we view the evidence, the defendant, if entitled to anything, could recover only for the month of September and nine days of October; so that \$80.00 would be all that he would be entitled to on unpaid wages, if entitled to anything. Appellant excepted to the 1st, 3d, 4th, 7th, 8th and 9th instructions given by the court for defendant. We think the 3d and 4th instructions are wrong; the 3d instructs the jury that the only evidence that the jury can consider as to the duty of pit-boss, is the by-laws of the company relating to such duties. The 4th instructs the jury that "if they believe that the articles of organization of plaintiff's company require a written record to be kept of all proceedings of the board of directors and stockholders of the company, then, unless the board keep such record, oral evidence of the facts required to be kept could not be considered. These instructions were both calculated to mislead the jury; neither of them lay down the law correctly, and both should have been refused. To the remaining instructions we see no valid objection. For the reasons above given, we reverse the judgment of the Circuit Court, and remand the cause.

Reversed and remanded.

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City of Cairo v. Allen.

CITY OF CAIRO
v.
ISAAC B. ALLEN.

EXECUTION CANNOT ISSUE AGAINST MUNICIPAL CORPORATION.—The statute prescribes the manner in which a judgment against a municipal corporation may be enforced, and it is error to award an execution on such a judgment.

APPEAL from the Circuit Court of Alexander county; the Hon. DAVID J. BAKER, Judge, presiding.

Messrs. GREEN & GILBERT, for appellant; that a municipal corporation may defend against bonds issued without authority, in whosoever hands they may be, cited Burr v. Carbondale, 76 Ill. 455; Town of East Oakland v. Skinner, 94 U. S. 256; Ryan v. Lynch, 68 Ill. 160; Marsh v. Fulton Co. 10 Wall. 676; Town of Coloma v. Eaves, 92 U. S. 490.

As to the manner in which ordinances should be passed: Laws 1869, 833, § 1; Laws 1867, 370, §§ 9, 16.

It being shown by the journal required by law to be kept, that the city council never did pass the supposed ordinance, evidence *aliunde* was inadmissible to contradict the journal: City of Lowell v. Wheelock, 11 Cush. 391; Covington v. Ludlow, 1 Met. 295; Boston Turnpike Co. v. Pomfret, 20 Conn. 500; Dufre v. Hoag, 1 Aiken, 286; School Dist. v. Atherton, 12 Met. 105; County Com'rs v. Chitwood, 8 Ind. 504; Jordan v. School Dist. 38 Me. 164; 1 Dillon on Mun. Cor. § 234; Bank, etc. v. Dandridge, 12 Wheat. 64.

If the city council, possessed of a certain power, has never delegated that power to any individual, the exercise of that power by an unauthorized person is *ultra vires*; it is a question of want of power: 1 Dillon on Mun. Cor. § 245; Miller v. Goodwin, 70 Ill. 659; Spangler v. Jacoby, 14 Ill. 297; Schuyler Co. v. The People, 25 Ill. 158; People v. Starne, 35 Ill. 121.

It was error to award execution against the city: Rev. Stat. 219, § 90; Chicago v. Hasley, 25 Ill. 598.

Messrs. LINEGAR & LANSDEN, for appellee; that the journal failing to show the proceedings of the city council, they may be proved otherwise, cited *Mariner v. Saunders*, 5 Gilm. 113; *White v. Herrman*, 62 Ill. 73; *Dillon on Mun. Cor.* §§ 237, 238; *Bank, etc. v. Dandridge*, 12 Wheat. 64; *Bigelow v. Perth Amboy*, 1 Dutch, 297; *San Antonio v. Lewis*, 9 Tex. 69; *Ross v. Madison*, 1 Ind. 281; *Langsdale v. Bouton*, 12 Ind. 467; *Indianapolis v. Imberry*, 17 Ind. 175.

TANNER, P. J. The appellee sued appellant in the Circuit Court of Alexander county, upon certain interest coupons, and recovered a judgment for \$600, with costs of suit. The appellant brings the case to this court and assigns various errors in the rulings of the court.

We have carefully examined and considered the record in reference to these alleged errors, and find but one well made. The court, upon rendering judgment, awarded an execution against the appellant. This was erroneous. Section 90, Chapter 24, R. S. 1874, provides the manner by which judgments obtained against municipal corporations must be paid, and such provision does not by any rule of construction, authorize the issuance of an execution against such corporations. It is manifest, at the first blush, that to hold that a judgment against a municipal corporation could be collected by execution, would strike at the very foundation of the corporation, and in many instances would, to say the least, seriously embarrass the corporations in the exercise of the powers and privileges conferred upon them by the Legislature, for the security and welfare of this citizens, and the aiding in the execution of the general police powers of the State.

In the case of the *City of Chicago v. Halsey*, 25 Ill. 598, the court held that an execution could not issue against the city, and supported the decision by a line of argument and reason scarcely equalled by any in our own or other courts.

The judgment of the Circuit Court, for this error, will be reversed and the cause remanded, to enable the appellee to move the court for the rendition of a proper judgment in the cause.

Reversed and remanded.

Donnan v. Bang.

ANDREW DONNAN

v.

WILLIAM BANG.

1. DENIAL OF JOINT LIABILITY.—The statute requiring a denial of joint liability to be made under oath, in proceedings before justices of the peace, is not intended to preclude the defendants from giving evidence on the trial, showing that they are not liable jointly, but only to relieve the plaintiff from proving a joint liability in the first instance.

2. INSTRUCTION AS TO PARTNERSHIP.—It was error to give an instruction that if the jury believe that the defendants were not in fact partners, still, if they acted as such, or held themselves out as partners, they should find for the plaintiff. The defendants were not sued as partners, neither was there any evidence to show that they acted as such, and the instruction was calculated to mislead the jury.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. C. F. NOETLING and Mr. R. A. HALBERT, for appellant; that the note given by one of the defendants in settlement of the claim, should have been surrendered before bringing suit against the maker and another jointly for the same cause of action, cited *Stevens v. Bradley*, 22 Ill. 244; *Rayburn v. Day*, 27 Ill. 47.

Statements in regard to a partnership made by one defendant in the absence of the other, should not have been admitted: *Degan v. Singer*, 41 Ill. 28; *Hahn v. St. Clair S. & Ins. Co.* 50 Ill. 456; *Bishop v. Georgeson*, 60 Ill. 434.

If a partnership is to be implied against defendants as directors of the railroad company, it should be against all the directors: *Hickey v. Stone*, 60 Ill. 458.

Instructions must be based on evidence: *Nicholls v. Bradsby*, 78 Ill. 44; *Ryan v. Donnelly*, 71 Ill. 100; *Reinback v. Crabtree*, 77 Ill. 182; *Drohn v. Brewer*, 77 Ill. 280; *T. W. & W. R. R. Co. v. Ingraham*, 77 Ill. 309; *Strauss v. Minzesheimer*, 78 Ill. 492; *Ill. Cent. R. R. Co. v. Cragin*, 71 Ill. 177; *I. B. & W. R. R. Co. v. Birney*, 71 Ill. 391; *Alexander v. Mt. Sterling*, 71

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Ill. 366; I. & St. L. R. R. Co. v. Miller, 71 Ill. 463; P. F. W. & C. R. R. Co. v. Powers, 74 Ill. 341.

Where improper instructions may have contributed to the result, a new trial should be given: T. W. & W. R. R. Co. v. Moore, 77 Ill. 217; T. W. & W. R. R. Co. v. Corn, 71 Ill. 493; C. B. & Q. R. R. Co. v. Van Patten, 74 Ill. 91.

Messrs. HAY & KNISPEN, for appellee; that it was unnecessary to prove a joint liability, it not having been put in issue by affidavit, cited Rev. Stat. Chap. 79, § 58; Warren v. Chambers, 12 Ill. 124; McKinney v. Peck, 28 Ill. 174; Stevenson v. Farnsworth, 2 Gilm. 715; Dwight v. Newell, 15 Ill. 333.

Defendants held themselves out as partners, and became liable to third persons as such: Poole v. Fischer, 62 Ill. 181; Smith v. Knight, 71 Ill. 148; Fischer v. Bowles, 20 Ill. 396; Niehoff v. Dudley, 40 Ill. 406.

A verdict will not be disturbed unless it is manifestly against the weight of evidence: Palmer v. Wier, 52 Ill. 341; Davis v. Hoepfner, 44 Ill. 306.

Even if there be a slight preponderance against the verdict it will not be disturbed: Bloomer v. Denman, 12 Ill. 240; Gooddell v. Woodruff, 20 Ill. 191; Chase v. Debolt, 2 Gilm. 371.

Taking a promissory note is a conditional payment only: Story on Promissory Notes, § 104; Heartt v. Rhodes, 66 Ill. 351.

A recovery can be had on the original consideration, without surrender of the note, if the note cannot be enforced by a third party: Miller v. Lumsden, 16 Ill. 161; Leake v. Brown, 43 Ill. 372.

It is not error to admit evidence which does not prejudice the opposite party: Thompson v. McLaughlin, 66 Ill. 407; C. & A. R. R. Co. v. Clampit, 63 Ill. 95.

The fact that improper evidence is admitted without objection, will not justify its rebuttal by evidence of the same character: Wickenkamp v. Wickenkamp, 77 Ill. 92.

WALL, J. This suit was brought by Bang against Donnan

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and Henderson, before a justice of the peace. Henderson was not served. Judgment having been rendered against Donnan, he appealed to the Circuit Court. The case was tried by a jury in the Circuit Court, and again resulted against Donnan. A motion for new trial having been overruled, the case is brought to this court by appeal.

The plaintiff's demand was for board furnished to a number of men who were engaged in surveying a projected railroad. These men were brought to the plaintiff by Henderson, who said the board should be charged to Donnan and himself. The bill amounted to \$136.70, upon which Henderson paid \$34.35, and for the balance, \$102.35, gave the plaintiff his individual note, which plaintiff assigned to the People's Bank. This note not being paid, suit was brought upon it by the bank against Henderson, and afterwards against Bang as endorser. Bang paid the latter judgment. There is no evidence in the record to show that Donnan authorized Henderson, or any one else, to incur this liability on his account; nor is there any evidence tending to show that Donnan and Henderson were partners in any wise, except that they were joint owners of some real estate.

The evidence for the defense shows that they were not partners, and that Henderson had no authority to pledge the credit of Donnan. These two men and a number of others were incorporators of the railroad company, of which Donnan was vice president. The bill was clearly incurred on account of the corporation. Henderson and Donnan were each actively engaged in pushing the survey, obtaining right of way, etc., and so far as they chose, could of course make themselves liable for supplies or services furnished to the company, but neither had power to involve the other without his consent. It is urged, however, that it was not necessary to prove the joint liability of Donnan and Henderson, they having been sued as joint defendants, and the joint liability not having been put in issue by affidavit. This proposition involves the proper construction of Sec. 58, Chap. 79, Rev. Stat. entitled "justices and constables," which reads as follows: "In actions upon contracts, expressed or implied, against two or more defendants as joint defendants or partners, or joint obligors or payors, whether so

alleged or not, proof of the joint liability or partnership of the defendants, or their christian or surnames, shall not in the first instance be required, to entitle the plaintiff or plaintiffs to judgment, unless the defendant or defendants, or any of them, shall deny the partnership or joint liability, or the execution of the instrument sued upon, by affidavit." On the one side it is contended that the want of such an affidavit precludes the defendants from questioning joint liability by proof. On the other, it is contended that the failure to file such affidavit only dispenses with the necessity of proof on the part of plaintiff in the first place, and that thereby a *prima facie* case only is made out, leaving defendants at liberty to offer evidence to overcome this presumptive or *prima facie* case. At common law, the plaintiff was held bound to prove every material averment essential to recovery, including, of course, the proof of the execution of a written instrument sued on, and the joint liability of all defendants in the action.

If the plaintiff failed in proving a joint contract he might be nonsuited on the trial, 1 Chitty Pl., 44; and the consequences of a mistake in this respect were serious and important. By the 12th section of the "act concerning practice in courts of law," approved Jan. 29, 1827, it was provided that no person should be permitted to deny on trial the execution of any instrument in writing sued on, etc., unless he should verify his plea by affidavit. This statute did not change the mode of pleading, but the rule of evidence only. The pleas of *non est factum* and *non assumpsit* were still proper, but unless verified by affidavit, the plaintiff was not bound to prove, and defendant was not permitted to deny, the execution of the instrument as before the passage of the act. The act, however, did not apply to the question of partnership or joint liability, and the plaintiff was still bound to make good this allegation in actions against partners or other joint defendants. To obviate this difficulty in part, it was provided in the second section of the "act regulating evidence in certain cases," approved February 17, 1841, "In actions upon contracts, express or implied, against two or more defendants, alleged to have been made or executed by such defendants as partners, or joint obligors, or payors, proof of the

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joint liability or partnership of the defendants, or their christian or surnames shall not, in the first instance, be required to entitle the plaintiff to judgment, unless such proof shall be rendered necessary by pleading in abatement, or the filing of pleas denying the execution of such writing, as is required by the "act concerning practice in courts of law." In the case of *Stevenson v. Farnsworth*, 2 Gilm. 715, it was held that this statute was intended to change the rule of evidence respecting the proof of partnership and put it upon the same footing with proof of the execution of written instruments, and that this act must receive the same construction as the act to which it referred, and if the partnership was not denied under oath, it was conclusively admitted. In the revision of 1845 the 12th section of the act of 1827, with reference to the proof of the execution of written instruments, appears as a part of section 14 of the Practice Act, chapter 83, R. S. 1845, page 415, while the 2nd section of the act of 1841 appears as section 8 of chapter 40, in regard to evidence and depositions, R. S. 1845, page 233, with this change, that the words "as required by law," are substituted for the words "as required by the act concerning practice in courts of law." In the case of *Warren v. Chambers*, 12 Ill. 124, the Supreme Court said: "The change of these words can not in the least alter the construction to be put upon the act." It is clear, therefore, that the phrase the "filing of pleas denying the execution of such writing," has reference to the plea required to be filed by section 14, chapter 83, R. S. to put in issue the genuineness of the instrument upon which suit is brought; and it was held that when persons were sued as partners not upon a written instrument, the joint liability should be put in issue by plea in abatement sworn to, and this not having been done, the partnership was conclusively admitted. In these cases the words "in the first instance," which were then in the section, were not deemed to limit the force of the section, but it was read as though these words were not in it, and the reference to the act of 1827, in the one case, and the construed reference to Sec. 14, Ch. 83, R. S. 1845, in the other case, was held to give the section the same effect as the section referred to.

In the case of *Stevenson v. Farnsworth*, the action was upon a promissory note alleged to have been executed by defendants as partners, by the style of C. Stevenson & Co. In the case of *Warren v. Chambers*, the declaration counted against the defendants as partners for money paid and advanced, and the real question before the court was, whether the partnership or joint liability must be raised by plea in abatement or by the general issue. A majority of the court held, that where defendants were jointly sued as the makers of a written instrument, a plea sworn to, denying the execution of the writing, would also put in issue the joint liability of the defendants; but where, as in the case then under consideration, the defendants were charged upon a contract or liability not in writing, a plea in abatement was necessary to raise the question of partnership or joint liability; and it was assumed though not discussed, and the point was not made, that without such a plea the joint liability was not to be controverted, and that all the evidence on the subject was improperly admitted, as no such question was made by the pleadings. It is remarkable that the force to be given to the words "in the first instance" was not considered, and the question does not appear to have attracted the attention of the court. In the case of *Lockridge v. Nuckolla*, 25 Ill. 178, the Supreme Court construed the 59th section of the Practice Act, which provided that "in actions upon bonds, notes, and all other writings made assignable by law, in the name of the assignee, the plaintiff shall not be held bound to prove the assignment or signature of any assignor unless the fact of assignment be put in issue by plea verified by affidavit of the defendant or some credible person, stating that he verily believes the facts stated to be true."

This section was compared with the 14th section of the Practice Act above referred to, which provided that "no person shall be permitted to deny on trial, the execution of any instrument, whether sealed or not, upon which any action may have been brought, etc., unless the person so denying the same should, if defendant verify his plea by affidavit, etc.," being the same provision originally enacted in the statute of 1827. The question was whether the same construction should be

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placed upon the 59th section, that had been uniformly placed upon section 14, and it was said, "a fair and reasonable construction of the two provisions justifies the distinction that under the one the maker cannot deny the execution of this instrument, either before or after it is introduced, while under the other he cannot deny it before, but may after its introduction in evidence."

It will be noticed that the section under consideration in 2 Gilm. and 12 Ill. was by its terms limited to cases where defendants were charged as partners, joint obligors or joint payors, and in *Petrie v. Newell*, 13 Ill. 647, it was held that when persons are sued as partners they should be so described in the declaration, and that to count against defendants as joint obligors, the declaration should be upon an instrument under seal, and if they are declared against as joint payors the count should be upon a simple instrument in which there is an express promise to pay—the word "implied" being held to refer to suits against partners declared as such. In the Revision of 1874 appears the section first above quoted, viz. Sec. 58, Ch. 79, having reference to proceedings before justices of the peace, and a similar section was placed in the Practice Act, Sec. 36, regulating proceedings in courts of record. It is noticeable that this Sec. 58 is unlike Sec. 8. Ch. 40, R. S. 1875, in two particulars. First, the words "joint defendants or" are interpolated before the word partners—thus enlarging the scope of cases to which the section might apply, so as to include a joint liability not arising out of a partnership or the execution of a written instrument, sealed or unsealed—and by the insertion of the words "whether so alleged or not," which is in the same direction. Secondly, the words "as required by law" are omitted. We think these changes are important, and that it is important that the section as thus modified is applied to proceedings before justices of the peace. Were we now called on to construe this section 58 without reference to the construction that has been given the 2nd section of the act of 1841, and the 8th section of the act of 1845, we would say without hesitation that in view of the rights of parties at common law, and the ordinary meaning of the language employed, the

effect is only to relieve the plaintiff from the necessity of proving joint liability when it is not denied by affidavit, in order to make out a *prima facie* case upon which he might recover, but that the defendant is still permitted to rebut the *prima facie* case thus made.

It is a fundamental rule, that in construing statutes, effect must be given to every word employed, if it can be done consistently; and no word should be held meaningless if such a result can be avoided. Where there are repugnant provisions, that construction must be adopted which is most in accordance with the general scope and intent of the whole act. But where there is no repugnancy, no part of the act should be ignored, but effect should be given to it all.

In the view we are inclined to take, full force is given to the words "in the first instance." In the other view which is urged on, these words are superfluous, and the section would have precisely the same meaning and effect without them. If this section 58 were in the same form as the sections considered in the cases of Warren v. Chambers, and Stevenson v. Farnsworth, we should perhaps feel bound to give it the construction claimed by the appellee; but considering the change in the language employed, and the enlargement of the provision to include a very important class of cases not embraced by the old statute, and the construction adopted in the case of Lockridge v. Nucholls, *supra*, we feel at liberty to put upon it the construction above indicated.

The section considered in the cases above cited had reference to practice in courts of record, and did not apply to suits before justices of the peace, where there are no written pleadings, and where it has always been the policy of legislation to simplify the proceedings as far as possible. No construction should be adopted that would tend to complicate or confuse or mislead in the trial of causes before these tribunals. Where persons are sued in a court of record as partners, or as joint makers of sealed or simple instruments of writing, it might involve no special hardship to compel the defendants to deny the partnership, or joint execution of the instrument sued on, under oath, as these are facts peculiarly within their own knowledge; but it would be a

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very harsh rule to compel defendants sued in a court where written pleadings are not required, to deny under oath a joint liability, which the plaintiff is not bound to allege, in contracts express or implied, and in default of such denial be held to a conclusive admission of such joint liability. In many cases that may be the essential matter in dispute, and might be a purely legal question. The legislature might enact such a rule and the courts would enforce it; but we think we ought not to ignore the ordinary import of any of the language employed for the purpose of placing such a construction upon this section.

In the trial of this case, the parties on both sides seemed to take the view that the joint liability was in issue. Evidence was offered upon the point by plaintiff, as well as by defendant, and an effort made to establish the proposition, and to controvert it, the result being as before stated; and it would seem too late now to insist, for the first time, that such evidence was inadmissible, when, if the objection had been made below, it could have been so easily obviated. No objection was there made by the plaintiff as to the relevancy of this proof on this ground. The plaintiff might waive it, and it may well be presumed, from the course taken by him, that he did waive it. The court gave the following instruction at the instance of the plaintiff :

“The court instructs the jury that even if they believe, from the evidence, that Henderson and Donnan were not in fact partners, still if they acted as partners, or held themselves out to the world or to the plaintiff as partners, they would be liable as partners, and they would then find for the plaintiff such amount as may be so proved.”

The defendants were not sued as partners, nor was there any evidence to show that they acted as partners. They were shown to have been jointly interested in some land, but this did not constitute them partners in a legal sense. The jury are advised by this instruction, that if the defendants acted as partners they would be liable as partners, and the jury should find for the plaintiff, assuming that the only point necessary to a recovery for the jury to investigate, was whether they had acted

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as partners, or so held themselves out to the world; and if the jury should so find, then the plaintiff's demand should be allowed.

In view of the testimony in the case, we think this instruction was calculated to, and probably did, mislead the jury. The judgment is reversed and cause remanded.

Reversed and remanded.

 ANDREW DONNAN

v.

JOHN GROSS.

JOINT LIABILITY—PARTNERSHIP.—The fact, if true, that the defendants were jointly engaged in an enterprise from which some kind of benefits or profits were expected, and it was intended that each should receive some part of the benefits or profits of such enterprise, does not constitute them partners; and an instruction that if the jury found such to be the fact, the plaintiff could recover, is erroneous, especially without proof that plaintiff's claim was rendered for the firm.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. WILDERMAN & HAMMILL, for appellant; that statements of one defendant as to a partnership cannot bind the other, where the question of partnership is in issue, cited 1 Greenleaf's Ev. § 177; 2 Greenleaf's Ev. § 484; Degan et al. v. Singer, 41 Ill. 28; Hahn v. St. Clair S. & Ins. Co. 50 Ill. 456.

If a person suffers his name to be used in business or holds himself out as partner, he will be so considered: 3 Kent's Com. 52; Fisher v. Bowles, 20 Ill. 396.

If the company was not properly organized then all the incorporators are liable as partners, and the action should be against all or none: Pettis et al. v. Atkins, 60 Ill. 455.

If an instruction assumes to be a complete statement of a case entitling a party to recover, it must state fully all that

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need be proved: *St. L. & S. E. R. R. Co. v. Britz*, 72 Ill. 261.

The instruction given for plaintiff warranted the jury in disregarding all other instructions: *Bennett v. Pulliam*, App. Ct. Fourth Dist. Feb. Term, 1878. [*ante* 185.]

Objections to evidence must be made in the court below: *Lowe v. Bliss*, 24 Ill. 169; *Johnson v. Adleman*, 35 Ill. 265; *Phy v. Clark*, 35 Ill. 377; *Jackson v. Warren*, 32 Ill. 331; *Gordon v. Goodell*, 34 Ill. 429; *Wickenkamp v. Wickenkamp*, 77 Ill. 92; *Craig v. McKinny*, 72 Ill. 305.

Pleadings before a justice are *ore tenus*: *Comstock v. Ward*, 22 Ill. 248; *Williams v. Corbett*, 28 Ill. 262.

Trying a case without a formal issue being made up, is a waiver of that question: *Durham v. Mulkey*, 59 Ill. 91; *Strohm v. Hayes*, 70 Ill. 41; *Bunker v. Green*, 48 Ill. 243; *Beesley v. Hamilton*, 50 Ill. 88; *Craig v. McKinney*, 72 Ill. 305; *King v. Haines*, 23 Ill. 340.

A plea denying partnership may be made with the general issue: *Stillson v. Hill*, 18 Ill. 262.

And without affidavit: *Lockridge v. Nuckolls*, 25 Ill. 178; *Rev. Stat. 1874, Chap. 73, § 36*.

The evidence fails to show a partnership: *Fawcett v. Osborne*, 32 Ill. 411; *Parsons on Partnership*, 66; *Holmes v. Old Colony R. R.* 15 Gray, 58; *Barckle v. Erkhart*, 1 Denio, 337; *Vanderburgh v. Hull*, 20 Wend. 70; *Loomis v. Marshall*, 12 Conn. 69; *Waugh v. Carver*, 1 Smith's Lead. Cas. 968.

Mr. F. A. McCONAUGHY, for appellee; that a denial of joint liability could not be made for the first time in the Circuit Court on appeal from a justice, cited *Bates et al. v. Bulkley*, 2 Gilm. 389.

Failure to deny joint liability by affidavit, operates as an admission: *Stevenson v. Farnsworth*, 2 Gilm. 715; *Warren v. Chambers*, 12 Ill. 124; *Davis v. Scarritt*, 17 Ill. 202.

A denial by one defendant makes proof necessary as to him only; *Davis v. Scarritt*, 17 Ill. 202; *Degan v. Singer*, 41 Ill. 28.

WALL, J. In this case Henderson and Donnan were sued jointly before a justice of the peace. Henderson was not served;

judgment was had against Donnan, who appealed to the Circuit Court, where he was again unsuccessful, and he brings the case to this court. The demand was for a livery bill, amounting to \$130.50, incurred by Henderson, as is claimed, on the joint account of himself and Donnan. The evidence in the record here presented fails to show any express authority from Donnan to incur liability on his account, nor can we say that there is anything in the whole case as it appears here, from which to imply a liability, based upon his relations with Henderson or with the corporation of which they were both members. It is shown that these two men were joint owners of some real estate, and it is in evidence that one item in the account was for buggy hire by Henderson, for the purpose of looking after the property.

It is also shown that Donnan occasionally hired horses and buggies of the plaintiff, but always paid for them. It is urged here, as in the case of *Donnan v. Bang*, decided at this term, that joint liability not having been denied under oath, the question could not be raised on the trial. This involves a construction of Sec. 58, Chap. 79, of the Revised Statutes. What was said in *Donnan v. Bang* upon this point applies here, and need not be repeated. The court, at the instance of the plaintiff, gave the following instruction: "The court instructs the jury that if they believe, from the evidence, that the said defendants, Henderson and Donnan, were jointly engaged in an enterprise from which some kind of benefits or profits were expected, and it was intended that each should receive some part of the benefits or profits of the said enterprise, then they are partners, and the jury will find for the plaintiff the amount proved to be due." It will probably not be urged that a partnership in its legal sense can be predicated upon the facts here stated, nor that the instruction is a critical or exact statement of a legal proposition; but unless it probably misled the jury, the case should not be reversed because it was given. It advises the jury that if they believe that Henderson and Donnan were jointly engaged in an enterprise from which each expected profit, they were partners, and the plaintiff should recover the amount proved to be due. The facts stated would

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not constitute a partnership; but if a partnership existed, the plaintiff could not have recovered unless his claim was for items rendered to the firm. This latter proposition was a question for the jury, supposing a partnership existed; but the instruction assumed it to be true, leaving for the jury only to find whether the two men were jointly engaged in an enterprise from which some kind of benefits or profits were expected by each. In view of the evidence, we think the jury were probably misled by the instruction. The judgment is reversed and the cause remanded.

Reversed and remanded.

CHARLES H. SAGAR

v.

F. H. ECKERT.

1. **FIXTURES—BUILDING FOR TRADE—WHEN MAY BE REMOVED.**—A temporary building, erected for the purposes of trade, and with the intention of removing the same, does not become a fixture. If the building was erected with an understanding had with the owner of the land, that it might be removed, it can be taken away after his death, if done within a reasonable time.

2. **DAMAGES FOR REMOVING.**—The appellee having only a life estate in the premises, can, in case of a removal of the building, only recover damages to the possession—such damages as were sustained to her life estate—and not for the full value of the building.

3. **EVIDENCE—DEATH OF PARTY—HUSBAND AND WIFE.**—The widow of the testator was not a competent witness to testify in reference to statements made by her deceased husband during his life, in relation to his partnership business.

APPEAL from the Circuit Court of St. Clair county; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. WILDERMAN & HAMILL, for appellant; that the fact of the building being set on top of the ground, sufficiently shows it was intended as a temporary structure—a mere chattel—cited *Kelly v. Austin*, 46 Ill. 156; *Ham v. Kendall*, 111

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Mass. 297; Taft v. Stetson, 117 Mass. 471; O'Donnell v. Hitchcock, 118 Mass. 401; Adams v. Lee, 31 Mich. 440.

Declarations made by the testator against his interest in reference to the property, were admissible: 1 Greenleaf's Ev. § 189; Vennum v. Thompson, 38 Ill. 143; Randegger v. Ehrhardt, 51 Ill. 101; Miner v. Phillips, 42 Ill. 123; Whitaker v. Wheeler, 44 Ill. 440.

Such declarations may be proved by his widow: Deniston v. Hoagland, 67 Ill. 265; Galbraith v. McLain, 84 Ill. 379.

The character of personal property, and right of removal, may be preserved by an agreement with the owner of the land, previous to annexation: Ewell on Fixtures, 66; Taft v. Stetson, 117 Mass. 471; Dooley v. Crist, 25 Ill. 551; Dame v. Dame, 38 N. H. 429.

It is not necessary that the widow of the land owner should have had notice of such an agreement: Harris v. Heuser, 42 Ill. 425; Rhoads v. Rhoads, 43 Ill. 239; Russell v. Richards, 10 Me. 429; Dubois v. Kelly, 10 Barb. 508; Mott v. Palmer, 1 Comst. 564.

Possession and occupancy of the building before and after the testator's death, was sufficient notice of appellant's rights: Lumbard v. Abbey, 73 Ill. 177; Amic v. Young, 69 Ill. 542.

If the building was erected by the firm for their business, although on the soil of one of the partners, it is personal property: Kelly v. Austin, 46 Ill. 156; Adams v. Lee, 31 Mich. 440; McDavid v. Wood, 5 Heisk. 95; Saunders v. Stallings, 5 Heisk. 65; Kerr v. Kingsbury, 17 Am. Law Reg. 638; Holbrook v. Chamberlain, 116 Mass. 155.

Mr. JAMES M. DILL, for appellee; that if the building was a trade fixture it should be removed at once, on the death of the owner of the soil, cited 1 Washburn on Real Property, 12.

Having rented the property from his sister, appellant is estopped from claiming it as his own: 1 Washburn on Real Property, 28; Loughran v. Ross, 45 N. Y. 792.

Appellee has a right of action to the extent of her life interest, for the removal of the building: Willard on Real Estate, 79; Fay v. Brewer, 3 Pick. 203.

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Justices of the peace have jurisdiction in actions for damages for injury to real property: Rev. Stat. Chap. 79, § 13.

TANNER, P. J. This was an action brought by the appellee, before a justice of the peace, to recover for damages done to real estate. The cause was taken to the Circuit Court of St. Clair county, and there submitted to a jury, and a verdict returned for the appellee. An application for a new trial was made and denied, and the cause is brought to this court by appeal. The facts disclosed by the record are that Charles Sagar, the father to the parties to the suit, died testate. By his last will and testament he devised to the appellee a life interest in and to certain real estate, with a remainder to her children. At the time of the testator's death there was upon the real estate so devised a temporary wooden building, erected by the appellant at his own expense, amounting to one hundred and fifty dollars, for the purpose of storing agricultural implements, in the sale of which he and his father had been engaged as partners. The father received one-half of the profits, but the business was conducted by the appellant and in his own name. The appellant was in possession of the building at the testator's death, and so continued for the period of seven months or more, at the expiration of which he demolished it, and removed the material of which it had been constructed. The main contest between the parties was whether the building was a fixture or personal property. We think there is no great difficulty in solving this inquiry to the advantage of appellant. The only testimony given, and tending to constitute the building a fixture, is that of the husband of the appellee. He states: "It was boarded up the sides, with boards on ends. It was built on sills, the siding nailed to the sills at the bottom; covered with a tin roof, joined to the building east of it. There was no foundation under the building; there was a sill set in the ground, I would think about six inches. I saw where they were taken out. They dug down into the ground, and they were put into the ground." The appellant says: "I put it up with an intention of taking it down; that was the understanding when I put it up—that I might remove it at any time. The building was set on the top of the ground; it was built first by

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leveling the ground, and throwing down grub plank the thirty foot way, every two feet, for a foundation. I then crossed it with grub plank, and made the floor; grub plank is lumber that is used in rafting, and is all bored through with holes; then we took four-by-four for the corner posts, and just sawed them off square, and set them down on the floor, and put a few nails to hold them in their places. We then sided it up with rough siding, up and down, and threw joists across the top, and they served as rafters also. I put it up with the understanding that I might remove it." This is all the testimony in reference to the character of the building, and the purposes for which it was erected

The case of *Kelly v. Austin*, 46 Ill. 158, is singularly in point, the facts being substantially the same as in the case now under consideration. The Court, in disposing of the question, say: "It was placed on the lot several months after the mortgage was given by the mortgagor, and his partner in the house-joiner business. It was placed on the lot by the firm for the use of their business. It seems to have been made of rough materials, slightly built, placed on blocks resting on boards, laid on the surface of the ground. It was not placed on a stone or brick foundation, and in no manner let into the ground. From the evidence it would seem to be manifest that it was not intended to be permanent in its character, or to have been placed there as an improvement of the lot, but seemingly to answer the convenience of the partnership. It was not constructed with the funds of the mortgagor, but with labor, material and means of the firm. If it did not become a part of the real estate, it was a chattel owned by the partnership. Had the building been of a permanent character, or had it been placed there with the intention of permanently remaining, then it could not be severed without the consent of the mortgagee. Or had it been placed on the lot by the mortgagor with his own means, it might have presented a different question. But from the character of its structure and the purpose for which it was employed, it would seem that it was not designed for any other than a temporary use, and to be removed from the lot when the object of its erection had been accomplished."

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In the foregoing case there seems to have been no proof of any agreement having been made by the firm, either with the mortgagor or mortgagee, for the removal of the building at the time of its erection. But the mortgagor formed a co-partnership with another to engage in the business or trade of carpentering, and the firm erected the shop. The mortgage was foreclosed under a power of sale, and the purchaser of the property filed a bill to enjoin the mortgagor from removing the shop. The doctrine enunciated by the decision in the Kelly case, *supra*, is that where there is no proof of a special agreement for the removal of the building between the owner of the ground and the person by whom it was erected, the question as to this right, based upon the intention of the parties, will be determined by the character of the building and the purposes for which it was erected. And this we believe to be the settled rule. 2 Washburn on Real Property, and authorities cited in note thereto.

But it will be observed that the case at bar is not entirely confined to the proof in reference to the character of the structure, to reach the intention of appellant and his father in respect to the removal of the shed.

The appellant states in his testimony, without objection, that he "put the building up with the understanding that he might remove it." We do not hesitate to hold that the evidence, when considered in reference to the doctrine of fixtures, as found in the elementary works upon this branch of the law, and in the cases adjudicated in the courts of our own States, shows clearly that the building was of a temporary character, and erected alone for the purposes of trade, and was therefore personal and not real property. But the counsel for the appellee urges that if the building was personal property, the appellant was only a tenant at will, and by his not having removed the property at once upon the death of his father, his right to do so had been lost long before the removal. This view cannot be applied to this case. If the appellant erected the structure with an understanding had with his father that he might remove it, we think he could do so after the father's death, provided he did so within a reasonable time thereafter. "If an article of the

character of a fixture be annexed to the freehold of another by his consent, the owner may remove it any time." Washburn on Real Property, 3d Ed. top p. 20. But if the record contained no evidence of an understanding for its removal at the time of erection, and the right to do so was determined solely by the purposes and character of its structure, we still think the doctrine cited in Washburn on Real Property would not affect the right claimed here by appellee. An examination of all the authorities cited in support of the text shows that they were founded upon leases for a definite term of years, where the tenant suffered his term to expire without the removal of fixtures.

In this case the appellant was doing business in the building as a partner of the father at the time of his death. The building was never surrendered to nor demanded by the devisee; but it appears that at various times communications passed between the parties in reference to the renting of the building or the "renting of the ground" upon which it stood; as to which we cannot fully determine, from the contradictory character of the evidence. The appellee, however, admits that she told appellant to occupy it, and whatever was reasonable would be satisfactory. We are disposed to hold that the appellant had a reasonable time in which to remove the building after the father's death, and that the delay was occasioned by the various efforts for a lease of the ground or building, and therefore did not constitute a waiver or forfeiture of the right to remove it. It is also clear that the judgment of the court cannot stand upon the theory that the building was a fixture. The appellee had a life estate, and she could only recover damage to the possession. The evidence shows the monthly rental value of the building to have been from three to four dollars, and it was held by appellant seven and two-third months before its removal. We, upon the evidence, can reconcile the judgment with no other theory but that it was for the full value of the building.

The extent of the recovery of the appellee was the damages sustained to her life estate, and not the value of the fixtures. This could not be approximated by any other just rule than

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by taking into consideration the monthly or annual rental value, less taxes and costs of repairs, and multiplying it by the probable duration of the life of the tenant. *Greer v. Mayor, &c.* of N. Y. 1 Abb. Pr. 206. This was not done. We think the court did not err in refusing to allow the widow of the testator to testify in reference to the statements made by him in reference to the right of the appellee to remove the building. The common law rule which excludes the survivor of the relation of husband and wife from testifying in a case like the one before us, has, singularly enough, escaped amidst all the legislative warfare made upon this branch of the law. The rule, in all its bearings, was thoroughly discussed in *Reeves v. Herr et al.* 59 Ill 81, and was there held to have undergone no statutory change to that time. Nor do we think that any alteration has been since made, either by statute or judicial construction. Sec. 5, Chap. 51, R. S. 1874, to which we are referred, does not, as supposed by counsel, affect the question. It only applies to actions existing between husband and wife. In the case at bar the widow was called to testify in reference to matter or knowledge she acquired from her deceased husband, concerning his business transactions with the appellant; and this is all that is required to render her inadmissible as a witness, under the rulings in *Reeves' case, supra*. But the cases of *Denniston v. Hoagland*, 67 Ill. 265; *Galbraith v. McLain*, 84 Ill. 379, are cited as construing our statutes to have changed this rule. A careful examination of these cases will show it to be otherwise. In the first, the court only disposed of the objection that was raised, and nothing further, which was that the widow was incompetent to testify, by reason of the 5th section of the chapter on evidence, above cited. Upon no other ground was her incompetency urged. The court very properly held that section five had reference only to actions between husband and wife. And in *Galbraith v. McLain* the same objection was raised, and nothing more. So much of the opinion of the court as is applicable, we give: "It is complained by appellant that the testimony of Rebecca Galbraith, the widow, was improperly admitted. Under the authority of *Denniston v. Hoagland, supra*, she was a proper witness, as neither her husband nor

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herself was a party to the suit. The fact that the transaction or conversation she spoke of occurred during marriage did not, under the act referred to, render her incompetent, as she was not a witness for or against her husband." Doubtless, if the question had been raised in either case, as to whether she could testify as to the conversations had with the husband in reference to the transactions under investigation, the rule laid down in Reeves' case would have been strictly followed. We think the court erred in not giving the appellant a new trial. The cause will be reversed and remanded.

Reversed and remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1878.

THE VILLAGE OF WARREN

v.

JOHN W. WRIGHT.

APPEAL BY VILLAGE—BOND MUST BE GIVEN.—A city or village incorporated under the general law, must give a bond on appeal the same as other parties in a suit.

APPEAL from the Circuit Court of Jo Daviess county; the Hon. JOHN V. EUSTACE, Judge, presiding. Opinion filed December 21, 1878.

Mr. J. W. LUKE, for appellant; that a city or village is not required to file a bond on appeal, cited Rev. Stat. 1874, 242, § 117.

Messrs. D. & T. J. SHEEAN, for appellee; for the motion to dismiss for want of bond filed, cited Laws of 1877, pp. 75, 137.

These two acts are *in pari materia*: Young v. Stearns, 11 Chicago Legal News, 11.

PILLSBURY, P. J. This case was tried at the May term, A. D. 1878, of the Circuit Court of Jo Daviess county, when a judgment was rendered against appellant for \$3,000, from which
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the village prayed an appeal to this court, which was allowed by the court below upon appellant filing bond in the sum of four thousand dollars, within thirty days from the adjournment of court with security to be approved by the clerk.

That part of the order relative to the filing of bond, was never complied with by appellant, but the record was filed in this court on appeal without such bond. The appellee now enters his motion herein to dismiss the appeal for want of such bond.

This motion is resisted by appellant on the ground that the village of Warren is organized under the general law, and hence is exempted by that law from giving bond upon appeal.

It does not appear from the record that appellant made any objection to the order of the court allowing the appeal upon condition of filing bond, therefore the question might be raised whether the appellant has not waived any right it might have to appeal without bond.

We prefer, however, to determine the question of the right of a city or village to an appeal under the statute, without bond, upon its merits.

This must depend upon the construction of the statute alone. By the statute, villages by their corporate name may sue and be sued, contract and be contracted with, acquire and hold real and personal property, etc.

This capacity to sue and be sued necessarily includes the right to become a party to the record in any litigation affecting their interests, and it does not appear that they were invested with greater privileges than other suitors by the statute, with the exception that they were exempted from furnishing an appeal bond when they prayed an appeal to a higher court in this State. Rev. Stat., 1874, page 262, § 177.

If this provision of the statute be still in force, there can be no doubt that the appellant would be entitled to an appeal without bond if it insisted upon such right.

The statute of 1845, Rev. Stat., p. 420, § 47, allowed appeals to the Supreme Court provided the party praying such appeal should file bond with sufficient security within the time limited by the court, and under this statute it never was

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supposed by the profession that municipal corporations were exempted from such provision, on the contrary, they were ever considered as a "party" within its meaning. This statute of 1845 was incorporated into the act of the General Assembly, approved Feb. 22, 1872, entitled "an act in regard to practice in courts of record," and became section 67 of that act. That the words "the party praying for such appeal" were broad enough, in the opinion of the General Assembly, to include corporations, is evident from the seventy-second section of said act, wherein it is provided that the charitable, educational penal and reformatory institutions under the control of the State, may prosecute appeals without bond, and the act having thus exempted one class of corporations from its operation, it follows that all others were included within its provisions under the well known rule of construction that the expression of the one is the exclusion of the other. That this is the correct view, more clearly appears from the construction placed upon it by the legislature.

The act above referred to was approved Feb. 22, 1872, and the act to provide for the incorporation of cities and villages was not approved until April 10th of the same year, and it was deemed necessary to expressly exempt such incorporations from the provision of the practice act requiring bond, which was done by the 177th section of the subsequent act.

If cities and villages were not included in the prior act, it was a work of supererogation to exclude them by the later act.

We are of the opinion, therefore, that municipal corporations were required by the practice act to file bond upon appeal, the same as any other party, and that Sec. 177 of the act for the incorporation of cities and villages is inconsistent in allowing such appeal without bond, with the practice act.

In 1877, the practice act was amended and section 67 was re-enacted, and the charitable institutions exempted as in the act of 1872. This act is entitled "An Act to amend an act in regard to practice in courts of record. Session Laws of 1877, p. 148, and is the last expressed will of the legislature upon the subject of appeals.

This act does not exclude cities and villages from its operation,

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and section 67 being the same as that of 1845 and 1872 is, as we have seen, sufficiently comprehensive to include them, and for the reasons above given, we are of opinion, is inconsistent with section 177 of the act concerning cities and villages.

By the last section of the act of 1877, it is provided that "all laws and parts of laws in conflict with this act are hereby repealed." If then, by the act of 1877, cities and villages are required to file appeal bonds, and by the act of 1872, relating to their incorporation, they are not required so to do, it follows that the two acts upon that subject are in conflict, and being so, the former act is expressly repealed by the subsequent one so far as they are thus in conflict.

This does not rest upon the doctrine of repeal by implication, but having determined that the former act is in conflict with the latest expressed will of the legislature, it is repealed by the express words of the act.

We are therefore of the opinion that the appellant should have complied with the order of the Circuit Court to file a bond, and not having done so, the appeal must be dismissed.

Appeal dismissed.

GEORGE D. GOULD

v.

THE COUNTY OF ROCK ISLAND.

ACTION AGAINST COUNTIES — DECLARATION—COMMON COUNTS—In an action against a municipal corporation, as a county, there are many different causes of action which may be proved under a declaration containing only the common counts, and such a declaration is not obnoxious to a general demurrer.

ERROR to the Circuit Court of Rock Island county; the Hon. GEORGE W. PLEASANTS, Judge, presiding. Opinion filed January 3, 1879.

Messrs. KENWORTHY & BEARDSLEY, for plaintiff in error; that

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a recovery may be had against a county under the common counts, cited Rev. Stat. 1874, 306 §§ 22, 24; *Bradford v. Chicago*, 25 Ill. 411; *Rew v. Barker*, 3 Cow. 280; *Dillon on Municipal Corporations*, 704; *Board of Supervisors etc. v. Reynolds*, 49 Ill. 186; *McClaughry v. Hancock Co.* 46 Ill. 357; *Armsby v. Warren County*, 20 Ill. 126; *County of LaSalle v. Simmons*, 5 Gilm. 513.

Where a special contract has been performed and nothing remains but payment, a recovery may be had under the common counts: *Thomas v. Caldwell*, 50 Ill. 138; *Elder v. Hood*, 38 Ill. 533; *Pickard v. Bates*, 38 Ill. 40; *Adlard v. Muldoon*, 45 Ill. 193; *Lane v. Adams*, 19 Ill. 169; *Childs v. Fischer*, 52 Ill. 205; *County of Jackson v. Hall*, 53 Ill. 440.

Messrs. SWEENEY, JACKSON & WALKER, for defendant in error; that taking leave to plead after demurrer is equivalent to confession of demurrer, cited *Haven v. Green*, 26 Ill. 253.

A declaration against a county, containing only counts for work and labor done, materials furnished, money paid, and for interest on money, will not support an action: *Seagraves v. Alton*, 13 Ill. 373; *Argenti v. San Francisco*, 16 Cal. 255.

As to the power of a municipal corporation to act and contract: *Betts v. Menard*, Breese, 395; *Perry v. Kinnear*, 42 Ill. 160; *Thompson v. Lee County*, 3 Wall. 330; *Mayor v. Ray*, 19 Wall. 475; *Kennard v. Cass County*, 3 Dillon, 146; *Thayer v. Montgomery County*, 3 Dillon, 389.

LELAND, J. This was an action of assumpsit in which a general demurrer was sustained to a declaration properly entitled, and which, after the usual commencement, is as follows:

"For that, whereas, the defendant, on the 8th day of April in the year, A. D. 1877, in the county aforesaid, was indebted to the plaintiff in the sum of \$3,000 for labor and services of the plaintiff, by him before that time done and bestowed in and about the business of the defendant at its request; and in the sum of \$3,000, for work before that time done and material for the same furnished by the plaintiff for the defendant, at its request; and in the sum of \$3,000 for money before that time

paid and expended by the plaintiff for the use of the defendant, at its request; and in the sum of \$3,000 for interest on divers sums of money before that forborne by the plaintiff, to the defendant, at its request, for divers spaces of time before then elapsed, and being so indebted, the defendant, in consideration thereof, then and there promised the plaintiff to pay him the said sum of money on request. Yet, the defendant, though requested so to do, has not paid the same or any part thereof, to the plaintiff, but re uses so to do, to the damage of the plaintiff of \$3,000, and therefore he brings this suit, etc.”

No exception is taken to the form or substance of the declaration, except that it is not good where a municipal corporation, like a county, is a defendant, though it would be in a case against an individual and other corporations not municipal.

The only question is whether the plaintiff below could under this declaration, introduce evidence of any cause of action. We think it is settled by the adjudications of our Supreme Court, that there might be many different causes of action against the defendant proved under the allegations aforesaid. We cite a few cases: *McClaghry v. Hancock County*, 46 Ill. 357; *Maher v. Chicago*, 38 Ill. 266; *Bradford v. Chicago*, 25 Ill. 411; *Armsby v. Warren County*, 20 Ill. 126; *The County of LaSalle v. Simmons*, 5 Gilm. 513; *County of Jackson v. Hall*, 53 Ill. 440.

We could, if important, enumerate many instances of labor and materials furnished and money paid for which there might be a recovery, not only on implied, but on express contracts fully performed, except payment of the money; also for interest on an adjusted balance, or on money withheld by an unreasonable and vexatious delay of payment.

Counsel for defendant in error concede that this declaration would be good if the count for money had and received were in it, and it is so decided in *LaSalle v. Simmons*, *supra*. Why not also concede, that where a contract for labor or materials has been performed, except payment, there could be a recovery under this declaration, as stated by Judge Walker on page 444 of the 53 Ill. *supra*? Or for money paid, laid out and

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expended, as decided in *Armsby v. Warren Co.* above cited? Or on an implied contract, *Maher v. Chicago*, 38 Ill. 266.

The question seems to us not to be an open one in this State. If it were, we should not consider it one about which there was any serious question. *Dillon on Municipal Corporations*, 2nd ed. § 383, note 1.

If the defendant desires to be more particularly informed in relation to the nature of plaintiff's demand it must have him ruled to furnish a bill of particulars.

Reversed and remanded.

 WILLIAM BABCOCK ET AL.

v. •

NICHOLAS HAMENDE.

CONTRACT FOR SALE OF LAND—RESCISSION.—A contract for the sale of lands, deed to be given on payment being made as described therein, is not broken by the vendor bringing a suit of forcible detainer and getting possession of the lands, the agreement not providing for possession by the vendee; nor does this fact present a defense to a suit upon a note given for the purchase money under the agreement.

APPEAL from the County Court of Iroquois county; the Hon. MANLIFF B. WRIGHT, Judge, presiding. Opinion filed January 3, 1879.

Messrs. KAY & EUANS, for appellants; that forcible detainer may be brought against a vendee in possession to regain possession on his failure to comply with the agreement, cited *Rev. Stat. 1874*, chap. 57, § 2; *Wilburn v. Haines*, 53 Ill. 207; *Monson v. Stevens*, 56 Ill. 335.

Mr. TRACY B. HARRIS, for appellee, as to the right of possession by vendee under the contract, cited *Williams v. Forbes*, 47 Ill. 148.

Being let into possession he is a tenant at will; *Dean v. Comstock*, 32 Ill. 173.

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A contract cannot be rescinded in part and enforced in part; Bowen v. Schuler, 41 Ill. 193; Ryan v. Brant, 42 Ill. 78.

SIBLEY, J. On the 4th of March, 1878, the appellants brought suit against appellee upon a promissory note in these words:

"\$850. On or before July 1st, A. D. 1875, I promise to pay Wm. Babcock, Sr., H. F. Ingersoll or order, eight hundred and fifty dollars, with interest at ten per cent. per annum, payable annually, both principal and interest payable at Babcock's office, in Canton, Illinois.

"NICHOLAS HAMENDE.

"Ashkum, October 19, 1874."

The defendant in the action pleaded: 1st, the general issue, and 2nd, a special plea as follows:

"And for a further plea in this behalf, the defendant says *actio non*, because he says that the said several supposed causes of action in each of the counts in said declaration are for one and the same thing, to-wit: The said promissory note in said declaration mentioned. And as to said note, the defendant says the plaintiffs ought not to maintain their said action, because he says that heretofore, to-wit: on the 19th day of October, 1874, at the said county, the plaintiffs and the defendant entered into a contract in writing, which said contract is as follows, to-wit:

"Know all men by these presents, that we, Henry F. Ingersoll and Wm. Babcock, Sr., of the county of Fulton, State of Illinois, are held and firmly bound unto Nicholas Hamende, of the county of Iroquois, State of Illinois, in the penal sum of eight thousand eight hundred dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, and every of them, firmly by these presents. Signed with our hands and sealed with our seal, this 19th day of October, A. D. 1874.

"The condition of the above bond or obligation is such, that whereas, the above bounden Henry F. Ingersoll and Wm. Babcock, Sen., have this day sold unto the said Nicholas Hamende, the following described real estate, situated in the county of

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Iroquois, State of Illinois, to wit: The south half ($S\frac{1}{2}$) of the northwest quarter ($NW\frac{1}{4}$), and north half ($N\frac{1}{2}$) of the southwest quarter ($SW\frac{1}{4}$), of section number seven (7), in township twenty-seven (27), north of range thirteen (13), west of second principal meridian, containing one hundred and fifty-seven and 26 one-hundredths acres (157.26), be the same more or less. Possession to be given by March first, A. D. 1875, for the sum of forty-four hundred (4,400) dollars. And whereas, the said Nicholas Hamende, to secure the payment of the said sum of money, has this day executed and delivered the said Henry F. Ingersoll and Wm. Babcock, Sen., his notes payable as follows, to wit: One note for two hundred dollars, due and payable on or before November 19th, 1874. One note for eight hundred and fifty dollars, due and payable on or before July 1st, 1875. One note for eight hundred and fifty dollars, due and payable on or before July 1st, 1876. One note for eight hundred and fifty dollars, due and payable on or before July 1st, 1877. One note for eight hundred and fifty dollars, due and payable on or before July 1st, 1878; and one note for eight hundred dollars, due and payable on or before July 1st, 1879; all of said notes drawing interest from date at the rate of ten per cent. per annum, interest payable annually; both principal and interest payable at Babcock's office, in Canton, Illinois.

"Now, therefore, if the said Nicholas Hamende, his heirs or assigns, shall well and truly, without defalcation or discount, pay unto the said Henry F. Ingersoll and Wm. Babcock, Sr., their heirs or assigns, the principal and interest, according to the tenor of the above described notes at maturity, and also pay all taxes or assessments upon said premises, made or laid after the date hereof, including the present year's taxes and assessments, without suffering the same or any part thereof to be sold therefor, all of which is to be taken and considered as a condition precedent on the part of the said Nicholas Hamende, his heirs or assigns, then the said Henry F. Ingersoll and Wm. Babcock, Sr., upon demand therefor, is to execute and deliver a good and sufficient deed of warranty for the said premises, to the said Nicholas Hamende, his heirs or assigns, or to whomsoever he may direct; which, when done, this bond,

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these presents, and all herein contained, to become null and void. But should default be made or suffered on the part of the said Nicholas Hamende, his heirs or assigns, in any of the conditions above specified on his part, then it shall be at the option of the said Henry F. Ingersoll and Wm. Babcock, Sr., their heirs or assigns, to enforce a performance of the same in law or equity previous to the making or tender of a deed for the said premises, or to declare this contract void and at an end. And in case of this contract being declared void and ended, upon default as aforesaid, the said Nicholas Hamende, his heirs or assigns, or any person or persons claiming by, through or under him or either of them, are to be taken and considered as tenants at sufferance (being in possession of the said premises), and shall surrender the full and peaceable possession of the said premises, together with all and singular the hereditaments and appurtenances thereunto belonging, or in anywise appertaining, upon thirty days' notice in writing, left or posted upon the said premises; and the said Nicholas Hamende, his heirs or assigns, shall forfeit all payments made thereon, and be liable for all damages done or suffered upon the said premises; and the title to the said premises to be and remain in the said Henry F. Ingersoll and Wm. Babcock, Sr. their heirs or assigns, the same to all intents and purposes as if no sale had been made.

"Witness our hand seals, this 19th day of October, A. D. 1874, aforesaid.

"HENRY F. INGERSOLL, [L. S.]

"WILLIAM BABCOCK, SR., [L. S.]

"Signed, sealed and delivered }
in presence of . . . }

"That said note in said declaration mentioned, in the second contract mentioned, given for the purchase money of the land therein described. That the defendant, in pursuance to said contract, on the first day of March, A. D. 1875, entered into the possession of the said land in said contract described. And that afterwards, to wit: on the fifth day of October, A. D. 1878, the defendant having failed to pay the said note in said declaration mentioned, and the notes maturing thereafter in said

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contract mentioned, the plaintiffs having on the fourth day of October, A. D. 1878, demanded possession of said premises, in writing, and without giving the thirty days' notice in said contract mentioned, commenced an action of forcible detainer before Asa B. Roff, Esq., one of the justices of the peace of said county, for the recovery of the possession of said land, in which said action the said plaintiffs were plaintiffs and the defendant was defendant; and in which said action such proceedings were had that a judgment was afterwards, to wit: on the 11th day of October, A. D. 1878, rendered therein in favor of said plaintiffs, and against the defendant, awarding to said plaintiffs the possession of said land, which said judgment is now in full force and effect; and afterwards, to wit: on the 16th day of October, A. D. 1878, possession of said land was, by virtue of said judgment, delivered by the defendant to the plaintiffs. And the defendant alleges that the plaintiffs thereby elected to declare, and hath thereby declared the said contract forfeited, and at an end, and hath thereby released and discharged the defendant from the payment of the said note in said declaration mentioned, and this the defendant is ready to verify, wherefore he prays judgment.

“By TRACY B. HARRIS,
“Defendant's Att'y.”

To this plea the plaintiffs interposed a demurrer, which was overruled by the County Court, and the only question here presented is whether the court erred in passing upon the sufficiency of that plea, which we think is very manifest. It appears from the record that the forcible detainer proceeding before the justice of the peace was not commenced until after the suit was brought upon the note in question. Hence the defense, if available at all, should have been pleaded *puis darrein continuance*. But the plea presented no substantial defense to the action. Counsel argue the case as if it was a breach of the contract on the part of the appellants to bring suit to recover possession of the premises described in it, and therefore appellee had the right to declare a rescission. The fault in the reasoning consists in assuming a fact that does not exist. There is not a word in the contract about the right of the vendee to

retain possession of the premises until the expiration of the time fixed for the payment of the whole of the consideration money, and it is only by inference that the contract permitted him to take possession of the lands bargained for. In *Wilburn v. Haines*, 53 Ill. 207, it was held that the bringing of a suit by the vendor against the vendee to recover possession of the premises did not amount to a rescission of the contract. It is true that it does not appear in the case whether the vendee entered into possession under the contract by a verbal or written permission from the vendor, yet we are unable to discover any distinguishable difference between the two cases.

There is no pretense in this case that the vendors had ever expressed any intention to declare a forfeiture of the contract; but on the contrary, were seeking to enforce it by bringing suit on the note for a portion of the consideration money, and as there is nothing in the contract to prevent them from taking possession, the vendor's had the right, as was said in *Wilburn v. Haines*, to "enjoy the premises while the contract was maturing." The statute of 1861 incorporated in the revised laws of 1874, § 2, p. 535, was passed to provide for just such cases as this, where the vendee had been let into possession under a contract of purchase and neglected to pay the consideration, as agreed upon, he should not be allowed to take advantage of his own neglect, and retain the possession against the will of the vendor, without any election on his part to declare a forfeiture if the right existed. The case of *Williams v. Forbes*, 47 Ill. 148, referred to by counsel for appellee, where the facts were similar to those appearing in this case, except that the plea did not aver that the vendee entered into possession by virtue of the contract, notwithstanding it was there held that the plea was no sufficient answer to the declaration on the note, still counsel assert if the plea had alleged that the vendee entered into possession under the contract by the terms of it, then the plea would have been held good.

The court declined to express any opinion in such a case, and the assumption is wholly unauthorized.

The judgment of the court below is therefore reversed and the cause remanded.

Reversed and remanded.

Simpson v. Simpson et al. Elgin City Banking Co. v. Eaton.

EDWARD SIMPSON

v.

GEORGE L. SIMPSON ET AL.

PRACTICE—FURTHER TIME TO FILE RECORD.—The motion for further time not being made within the time limited for filing the record, it is refused.

APPEAL from the Circuit Court of Putnam county; the Hon. JOHN BURNS, Judge, presiding. Opinion filed January 4, 1879.

Mr. FRED. S. POTTER, for appellant; that the motion was made in time, cited *Adams v. Robertson*, 40 Ill. 40.

PER CURIAM. The motion in this cause for further time in which to file record not having been made within the time limited by the statute for filing such record, we cannot allow the record now to be filed. *Adams v. Robertson*, 40 Ill. 40.

THE ELGIN CITY BANKING COMPANY

v.

WALDO R. EATON.

TAX UPON CAPITAL STOCK —The decree of the court below dissolving the injunction restraining collection of the tax, is affirmed on the authority of *Pacific Hotel Co. v. Lieb et al.* 83 Ill. 602.

ERROR to the Circuit Court of Kane county; the Hon. T. D. MURPHY, Judge, presiding. Opinion filed January 7, 1879.

Messrs. BOTSFORD & BARRY, for plaintiff in error; that the State Board of Equalization could not impose any rule to destroy uniformity in taxation, cited *C. B. & Q. R. R. Co. v. Cole*, 75 Ill. 591.

The bill should not have been dismissed on motion, but

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should have been retained for answer: *Wescott v. Wicks*, 72 Ill. 524.

If the assessment was made on the deposit account, which was not subject to taxation, it is illegal: *McConkey v. Smith*, 73 Ill. 313.

A court of equity will restrain an unauthorized tax: *Vieley v. Thompson*, 44 Ill. 9; *Ill. Cent. R. R. Co. v. McLean*, 17 Ill. 291; *Drake v. Phillips*, 40 Ill. 388; *Nat. Bank Shawneetown v. Cook*, 77 Ill. 622.

Taxes must be uniform *Village of Nunda v. Crystal Lake*, 79 Ill. 311; *Bureau Co. v. C. B. & Q. R. R. Co.* 44 Ill. 229; *C. & N. W. R. R. Co. v. Boone Co.* 44 Ill. 240; *Darling v. Gunn*, 50 Ill. 424; *C. & A. R. R. Co. v. Livingston Co.* 68 Ill. 458.

Mr. HENRY B. WILLIS and Mr. EUGENE CLIFFORD, for defendant in error; that the action of the State Board, including United States bonds in arriving at the capital stock, was legal, cited *The People v. Bradley*, 39 Ill. 130; *McVeagh v. City of Chicago*, 49 Ill. 318; *City of Chicago v. Lunt, Preston & Kean*, 52 Ill. 414.

As to assessment of capital stock: *Porter v. R. R. I. & St. L. R. R. Co.* 76 Ill. 561.

There is no allegation of fraud in the bill, and a court of equity cannot take jurisdiction: *Cook County v. C. B. & Q. R. R. Co.* 35 Ill. 466; *Chicago v. Beatrice*, 24 Ill. 489; *Elliott v. Chicago*, 48 Ill. 294; *Ottawa v. Walker*, 21 Ill. 608; *Metz v. Anderson*, 23 Ill. 467; *Porter v. R. R. I. & St. L. R. R. Co.* 76 Ill. 561.

The motion to dissolve injunction was treated as a demurrer, and there was no error in dismissing the bill, leave to amend not being asked for: *McDowell v. Cochran*, 11 Ill. 31; *Puterbaugh v. Elliott*, 22 Ill. 159; *Swinney v. Beard*, 71 Ill. 27.

PER CURIAM. This was purely an injunction bill to restrain the collection of a tax assessed by the State Board of Equalization upon the capital stock of plaintiff in error. Upon motion the court below dissolved the injunction and dismissed the bill. All the questions made by the plaintiff in error are fully

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argued and determined in the case of the Pacific Hotel Co. v. Lieb et al. in 83 Ill. 602, and we do not deem it necessary to re-state the principles there announced.

The injunction was properly dissolved, and no other relief being sought by the bill, it was not error to dismiss it upon such motion. Titus v. Mabee, 26 Ill. 257.

Decree affirmed.

MARY LYON
v.
HORACE LYON.

1. EVIDENCE—PAROL EXPLANATION OF LETTER.—A witness cannot be allowed to state what he meant in a written paper, unless there is some latent ambiguity, some sign or word that has a peculiar significance, not generally understood. The paper itself must be its own interpreter.

2. DEATH OF ONE PARTY—OPPOSITE PARTY CANNOT TESTIFY.—A defendant is prohibited by the statute from testifying on his own behalf as to the state of accounts between himself and the deceased prior to the latter's death.

ERROR to the Circuit Court of Kane county; the Hon. H. H. CODY, Judge, presiding. Opinion filed January 14, 1879.

Messrs. BOTSFORD & BARRY, for plaintiff in error.

Mr. JAMES COLEMAN and Mr. E. S. JOSLYN, for defendant in error; as to the right of a party whose statements have been offered in evidence, to explain or disprove them, cited Young v. Foute, 43 Ill. 33; 1 Phillips on Evidence, Cowen & Hill's notes, 371.

SIBLEY, J. Mary Lyon, administratrix of the estate of David Lyon, deceased, sued Horace Lyon in the Circuit Court of Kane county, declaring upon three promissory notes: one for the sum of \$300, dated September 8th, 1864, due in ten days after date; one dated March 17, 1865, for \$100, payable one

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year after date, and one for \$300, dated February 15th, 1871, due in ninety days after date, all of them executed by Horace Lyon to David Lyon, in his lifetime. The defendant pleaded the general issue; trial was had before the court and jury, and verdict for the defendant.

On the trial of the cause, the defendant undertook to prove that the notes had been paid. Mark White testified that in October, 1863, he collected for the defendant \$229.73, and by his direction, paid it over to David Lyon. Other sums were proven to have been paid for the defendant to David Lyon after the execution of the notes read in evidence.

By way of rebuttal, the administratrix read a letter in evidence, written by the defendant, Oct. 3, 1875, to his brother, in these words: * * *

“LEE CENTER, Oct. 3, 1875.

“*Dear Brother:*— * * * Tell father it was not because I owed him that I did not answer his letter, but through neglect and being hard up for money, but will pay him as soon as we sell this lot of horses, all up, I think, and am in hopes to have some left. * * ”

On his cross-examination, among other questions he was asked “What he meant by that letter?” and the court, against the objection of the plaintiff, permitted him to answer the question. He testified, “that he did not then know as he owed him anything, but afterward found that he was mistaken.” In this we think the court erred. It is too well established that a witness cannot be allowed to state what he meant in a written paper to require any authority in its support—the paper itself must be its own interpreter—to explain its meaning by oral testimony, unless there is some latent ambiguity, or some sign or word that has a peculiar significance not generally understood.

Besides the answer indicated to the jury, that the notes had been all settled, and he was not indebted upon them, he then was testifying on his own behalf as to the state of the accounts between him and the deceased prior to the latter's death, in a suit by the administratrix, which is not permitted by the statute.

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The court was asked on the part of the plaintiff to instruct the jury that the amount collected by White in 1863, and paid over to David Lyon, could not be allowed as a payment on the notes. The instruction was modified by the court, by adding "unless you believe, from the evidence, that such amount was in fact intended by the parties to apply upon these notes or some of them." We look in vain through the record for any evidence upon which to base this modification. It will be observed that there was no plea of set-off in the case. How then could it be inferred, in the absence of any testimony that the parties intended the sum paid nearly a year before the execution of the first note was intended by the parties to be applied as a payment upon either of them? The modification should not have been made.

For reasons indicated, the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

JOHN WINDHEIM

v.

CONRAD OHLENDORF.

1. **PROMISSORY NOTE—BLANK INDORSEMENT—WRITING GUARANTY OVER INDORSEMENT.**—The law is well settled that the holder of a promissory note has no authority to write a contract of guaranty over the name of an indorser, unless such act is the mere reducing to writing of a previously existing contract of guaranty.

2. **EVIDENCE OF PREVIOUS ORAL CONTRACT.**—Where a contract of guaranty is written over a blank indorsement in the presence of the court and jury, or even before the trial, and a declaration upon such guaranty, there should be some evidence tending to show the existence of an oral contract of guaranty, before the written contract, denied under oath, should be permitted to go to the jury. In the absence of such proof the court should have admitted the contract of assignment, and excluded from the jury the supposed contract of guaranty.

3. **INDORSER'S LIABILITY—DILIGENCE—EVIDENCE THAT SUIT WOULD BE UNAVAILING.**—To charge an indorser it must be shown that there has been due diligence by suit to collect the amount from the makers, or that

suit would have been unavailing, and as to the last, hearsay evidence that the land occupied by the makers was mortgaged, is not competent. The mortgages and deeds, or copies of the record, are the best evidence, and should first be produced.

4. PRACTICE—ADMISSION OF EVIDENCE AFTER ARGUMENT BEGUN.—The refusal of the court to allow the defendant to testify after the argument had proceeded, was a proper exercise of discretion.

APPEAL from the Circuit Court of Will county; the Hon. FRANCIS GOODSPEED, Judge, presiding. Opinion filed January 14, 1879.

Messrs. BROWN & MEERS, for appellant; that the execution of an indorsement, when denied under oath, must be proven, cited Rev. Stat. Chap. 79, § 56; Chap. 110, § 34.

An indorsement in blank is a contract under the statute, and cannot be varied by parol: *Mason v. Burton*, 54 Ill. 350; *Beattie v. Browne*, 64 Ill. 360; *Clayes v. White*, 65 Ill. 357.

A party filling in a blank indorsement with a guaranty, must show that such a contract was really made: *Dietrich v. Mitchell*, 43 Ill. 40; *White v. Weaver*, 41 Ill. 409; *Croskey v. Skinner*, 44 Ill. 321; *Maxwell v. Van Sant*, 46 Ill. 58.

Promissory notes in this State are negotiable only by force of the statute: *New Hope Bridge Co. v. Perry*, 11 Ill. 467.

A promise to pay a note, made by an indorser before maturity, is no waiver of due diligence to collect of maker: 1 *Parsons on Contracts*, 270; *Story on Promissory Notes*, 273; 1 *Parsons on Bills and Notes*, 592; *Savage v. Bievier*, 12 How. Pr. 166; *Leffingwell v. White*, 1 Johns. Cas. 99; *Kyle v. Green*, 14 Ohio, 490.

It is an abuse of the court's discretion to refuse to admit testimony inadvertently omitted, at any time before the case is closed: *Seely v. Pelton*, 63 Ill. 101; *Mercer v. Sayre*, 7 Johns. 306; *Lovett v. Adams*, 3 Wend. 376.

As to what is due diligence: *Saunders v. O'Briant*, 2 Scam. 369; *Chalmers v. Moore*, 22 Ill. 359; *Roberts v. Haskell*, 20 Ill. 59.

Incumbrances cannot be shown by parol: *Roberts v. Haskell*, 20 Ill. 59; *Clayes v. White*, 83 Ill. 540; *Chalmers v. Moore*, 22 Ill. 359.

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A person in possession of land is *prima facie* the owner: Chicago v. O'Brennan, 65 Ill. 165.

Messrs. HILL & DIBBELL, for appellee; that admission of testimony after argument begun, is discretionary with the court, cited Farmer v. Farmer, 72 Ill. 32.

Relevancy of such offered testimony should be shown and the ruling of the court excepted to: Warner v. Manski, 17 Ill. 235; I. & St. L. R. R. Co. v. Miller, 62 Ill. 468.

It was not error to admit the note and indorsement of guaranty, and if error, defendant should have objected or moved to exclude it: Peoria M. & F. Ins. Co. v. Anapow, 45 Ill. 86; Wooters v. King, 54 Ill. 343; Miliken v. Marlin, 66 Ill. 13; Chicago v. Scholten, 75 Ill. 471; Wickencamp v. Wickencamp, 77 Ill. 92; Snyder v. Lafromboise, Breese, 343; Leittich v. Mitchell, 73 Ill. 603; G. & S. W. R. R. Co. v. Birkbeck, 70 Ill. 208; Wilhelm v. The People, 72 Ill. 468; Gardner v. Eberhart, 82 Ill. 316; Reynolds v. Palmer, 70 Ill. 288; People v. Gray, 72 Ill. 346; Johnson v. Adleman, 35 Ill. 265.

If the objection is such that it could be removed by further proof, it must be taken on the trial: Harmon v. Thornton, 2 Scam. 351; President, etc. v. Holland, 19 Ill. 271; Sargeant v. Kellogg, 5 Gilm. 273; Swift v. Whitney, 21 Ill. 144; Stone v. G. W. Oil Co. 41 Ill. 86; Graham v. Anderson, 42 Ill. 515; Howell v. Edmonds, 47 Ill. 79; Moser v. Kreigh, 49 Ill. 84; Hanford v. Obrecht, 49 Ill. 146.

As to plaintiff's right to fill the blank indorsement with a guaranty: Webster v. Cobb, 17 Ill. 459; Smith v. Finch, 2 Scam. 322; Camden v. McKoy, 3 Scam. 437; Croskey v. Skinner, 44 Ill. 321; Hance v. Miller, 21 Ill. 639; Glickauf v. Kauffman, 73 Ill. 378; Pahlman v. Taylor, 75 Ill. 629; Boynton v. Pierce, 79 Ill. 145; Hamilton v. Johnston, 82 Ill. 39; Stowell v. Ramond, 81 Ill. 120.

A promise by an indorser after delivery of the note, but before maturity, to pay it, is a waiver of proof of insolvency or due diligence: Curtiss v. Martin, 20 Ill. 557; Chitty on Bills, 501; Story on Bills, § 371; Tobey v. Berly, 26 Ill. 426; Morgan v. Peet, 32 Ill. 281; Walker v. Rogers, 40 Ill. 278;

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Morgan v. Peet, 41 Ill. 347; Givens v. Mer. Nat. Bank, 85 Ill. 442; Thornton v. Wynn, 12 Wheat. 183; Leffingwell v. White, 1 Johns. Cas. 99; Sigerson v. Matthews, 20 How. 500; Whitney v. Abbott, 5 N. H. 378; Bruce v. Lytle, 13 Barb. 163; Lary v. Young, 8 Ark. 401; Jones v. Fales, 4 Mass. 251; Hopkins v. Liswell, 12 Mass. 52; Boyd v. Cleveland, 4 Pick. 524; Taunton Bank v. Richardson, 5 Pick. 436; Coddington v. Davis, 3 Denio, 20; Norton v. Lewis, 2 Conn. 480; Parsons on Bills and Notes, 586; Story on Promissory Notes, § 271; 2 Greenleaf's Ev. § 190.

Insolvency is proved by general reputation, facts or admissions of the maker: Humphrey v. Collier, Breese, 297; Raplec v. Morgan, 2 Scam. 561; Wickersham v. Altom 77 Ill. 622; 1 Phillips' Ev. *378.

LELAND, J. This was an action commenced by Ohlendorf against Windheim, then the payee and indorser in blank of a promissory note, of which Thomas Ryan and Dennis Ryan were the makers, and appealed to the Circuit Court.

As the suit was brought before a justice of the peace, where pleadings are oral, we may consider that on the trial in the Circuit Court, the plaintiff had declared against the defendant as indorser and also as guarantor.

After the trial had commenced in the Circuit Court and in the presence of the court and jury, these words were written above the name of Windheim:

"Value received, I assign and guarantee the within note to Conrad Ohlendorf."

The defendant then asked for and obtained leave to file an affidavit, denying the execution of this guaranty so then written, and we think the fair construction of the stipulation that the affidavit was thereafter to be written as of the present time, was that the question of the admissibility of the contract of guaranty should be decided in the same way it would have been if a sufficient affidavit, denying the execution, were then on file. In the affidavit which was filed the word "indorsement" means the guaranty indorsed during the trial on the note over the name, and not the signature or blank indorsement which was there before.

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The record shows, we think clearly, that there was an objection to the introduction in evidence of this contract of guaranty, and for the reason that it was thus written without authority over the name, and that the court overruled the objection and admitted it, and that exception was taken. It was conceded that Windheim wrote his name on the back of the note, and that the words of guaranty were written over the name on the trial.

There was no evidence tending to show any other contract than the one the law implies, from the fact that the payee of a note has placed his name only on the back of it. There was no *not pros.* as to the oral counts on the guaranty in the plaintiff's oral declaration, nor any oral statement of plaintiff equivalent thereto.

The law is well settled that there was no authority to write a contract of guaranty over the name, unless it was the mere reducing to writing of a previously existing contract of guaranty, and we think where it is conceded that words of guaranty are in the presence of the court and jury, or even if before the trial, written over a blank indorsement of the payee of a note, and where there is a declaration on the contract of guaranty, there should be some evidence tending to show the existence of an oral contract to that effect before the written contract, denied under oath, should be permitted to go to the jury. *Boynton v. Pierce, et al.* 79 Ill. 145. If there were written pleadings, and all the counts on the guaranty were *not prosessed*, so there was no such issue, which the jury had been sworn to try, it might do no harm, and whether pleadings are oral or written, can make no difference.

In this case we think the court should have admitted the contract of assignment, and excluded the offered supposed contract of guaranty (as such contracts are separate and distinct, and unlike each other), in the absence of evidence tending to prove any contract of guaranty, and the court could easily, in its ruling, have separated the one from the other, notwithstanding the improper attempt of plaintiff to intermingle them.

The jury having such written contract of guaranty with them in their room, admitted by the court without explanation

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against the objection of the defendant, might well consider it properly before them as evidence to be considered, and if so, entirely sufficient without troubling themselves about the more complicated questions growing out of the contract of assignment, and as they had sworn to try the issues they would feel compelled legally to do so, and decide the issue as to the guaranty for the plaintiff. Nor do we think it a sufficient answer to say that the court would, if asked by defendant, have instructed the jury that though both contracts were in evidence, they should treat one of them as not in. We cannot say what might have been done; all we can say is that one of the contracts was improperly in evidence.

There was, it is true, a trial as to the liability of defendant as endorser, but we cannot tell whether the jury found against him as endorser or guarantor.

As to the trial of the issue in relation to defendant's liability as endorser, there was, we think, error. It was of course, necessary to prove due diligence by suit against the makers, or that such suit would have been unavailing, or some change of the conditional promise to an absolute one of defendant to pay plaintiff if the makers of the note did not, and that there was some consideration for such absolute promise.

On that branch of the case, that a suit was unavailing because of the insolvency of the makers of the note, or that there was not due diligence by suit, it appeared that the makers and a brother were residing on a farm, claiming to own it, and therefore *prima facie* the owners thereof. *City of Chicago v. O'Brennan*, 65 Ill. 165. In order to show that there was nothing to be made out of this real estate, plaintiff was permitted against objection, to prove by witnesses that they had heard that the land was mortgaged, and also that it had been sold. As to diligence by suit, see *Saunders v. O'Briant*, 2 Scam. 369. The objection to this evidence was put upon the ground that such facts could not be proved by hearsay and mere rumor, but that the best evidence should be produced, viz.: the mortgages and deeds or copies from the recorder's office.

We think the objection made should have been sustained, and that the court erred in allowing that kind of evidence.

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Roberts v. Haskell, 20 Ill. 59; Chalmers v. Moore, 22 Ill. 359; Clayes v. White, 83 Ill. 540.

The refusal of the court to allow the defendant to testify after the argument had proceeded so far, was a reasonable and proper exercise of discretion. Counsel for defendant ought to know all that their client could testify to before entering on the trial. After the argument has commenced witnesses often leave the court room, and it would be improper, as a general rule, to allow a witness to be examined at that stage of the proceedings, when those who might contradict him had left; though it might in some cases be a proper exercise of discretion. There are other points made as to proving insolvency by general reputation, rumor, etc., and as to an instruction on the subject of a supposed promise by defendant to pay the note to plaintiff, if makers did not; but we have already said all that is necessary.

For the errors aforesaid the judgment is reversed and the cause remanded.

Reversed and remanded.

EDWIN MOORE, use, etc.

v.

JULES GRAVELOT ET AL.

1. **EQUITABLE ASSIGNMENT**.—An order or draft drawn for the whole of a particular fund operates as an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hands.

2. **ACCEPTANCE BY DRAWEE**.—But where the order is drawn either on a general or particular fund for a part only, it does not amount to an assignment of that part, or give a lien against the drawee, unless he consents to the appropriation by an acceptance of the draft.

3. **ASSIGNEE MUST GIVE NOTICE**.—It is the duty of the assignee, if he would protect himself, to give prompt notice of the assignment to him, and a failure to do so, although it would not destroy his right, would expose it to the danger of being overreached by a subsequent assignment to another, or to the rights of an attaching creditor of the assignor.

APPEAL from the Circuit Court of Iroquois county; the

HON. FRANKLIN BLADES, Judge, presiding. Opinion filed January 7, 1879.

Mr. ROBERT DOYLE, for appellant; that where the amount due is fixed, interest is recoverable thereon until paid, cited *Ditch v. Vollhardt*, 82 Ill. 134; *Haight v. McVeagh*, 69 Ill. 624; *Clark v. Dutton*, 69 Ill. 521; *Knickerbocker Ins. Co. v. Gould*, 80 Ill. 388; *Maltman v. Williamson*, 69 Ill. 423.

The garnishment creditor is entitled to all that is due from the garnishee, including interest: *McCoy v. Williams*, 1 Gilm. 584; *First Baptist Church v. Hyde*, 40 Ill. 150.

The order in question is an ordinary bill of exchange, and does not operate as an equitable assignment until accepted: *McLeod v. Snee*, 1 Stra. 762; *Hansonlin v. Hartsink*, 7 T. Rep. 733; *Kelly v. Mayor of Brooklyn*, 4 Hill, 263; *Kimball v. Donald*, 20 Mo. 579; *Gibson v. Cooke*, 20 Pick. 18; *Harris v. Clark*, 3 Caines, 115; *Lunt v. Bank of North America*, 49 Barb. 229; *Mandeville v. Welch*, 5 Wheat. 286; *Winter v. Drury*, 1 Seld. 525; *Chapman v. White*, 2 Seld. 416; *Sands v. Matthews*, 27 Ala. 399; *Harris v. Clark*, 3 Comst. 115.

An order or draft for a part of a debt only, does not amount to an assignment *pro tanto*; 5 Wheat. 286; *Tieman v. Jackson*, 5 Pet. 580; *Walker v. Manro*, 18 Mo. 564; *Gibson v. Cooke*, 20 Pick. 18.

Until notice of assignment the debtor cannot be considered as holding the fund in trust for the assignee: *Deasal v. Hall*, 3 Russ. 1; *Leverage v. Cooper*, 3 Russ. 30; *Freeman v. Rambottom*, 2 Sherm. 35; *Foster v. Cocksell*, 9 Bligh, 332; *Douglass v. Hunter*, 19 Vt. 98; *Ward v. Morrison*, 25 Vt. 199.

Service of garnishee process before notice to the debtor of an assignment, will hold the fund: *Judah v. Judd*, 5 Day, 534; *Woodbridge v. Perkins*, 3 Day, 364; *Van Buskirk v. Hartford Fire Ins. Co.* 14 Conn. 144; *Bishop v. Holcomb*, 10 Conn. 444; *Barron v. Porter*, 44 Vt. 287; 19 Vt. 93; 25 Vt. 199.

The notice must be actual and not constructive: *Iglehart v. Crane*, 42 Ill. 261; *Lock v. Fulford*, 52 Ill. 166.

Notice by a second assignee will prevail over the claim of a prior assignee who has not given notice: *Story's Eq. Jur.* 301.

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MR. JAMES FLETCHER, for appellee Yates; that an order drawn on a specific fund operates as an equitable assignment of that fund, cited 1 Daniel on Negotiable Instruments, § 21; Morton v. Naylor, 1 Hill, 583; Mandeville v. Welch, 5 Wheat. 277; Anderson v. DeSeor, 6 Gratt. 364; Robins v. Bacon, 3 Greenlf. 346; Drake on Attachments, § 604.

In equity all contracts and agreements may be assigned and the assignee will be protected: Carr v. Waugh, 28 Ill. 418; Hodson v. McConnell, 12 Ill. 170; Chapman v. Shattuck, 3 Gilm. 49; Morris v. Cheney, 51 Ill. 451.

By giving the order the debt became transferred to the assignee: 1 Daniel on Negotiable Instruments, 17; Morton v. Naylor, 1 Hill, 523; Drake on Attachment, 611; Gibson v. Cook, 20 Pick. 15; Morris v. Cheney 51, Ill. 451; Kimrod v. Baugh, 85 Ill. 437; 2 Story's Eq. 1044.

The assignee will be protected, though no notice of the assignment was given: Morris v. Cheney, 51 Ill. 451; Anderson v. DeSeor, 6 Gratt. 384; 1 Daniel on Negotiable Instruments, 17; Carr v. Waugh, 28 Ill. 418; Miner v. Schenck, 3 Hill, 228; Dix v. Cobb, 4 Mass. 508.

SIBLEY, J. Jules Gravelot was indebted to Edwin Moore for pasturing cattle, in the sum of \$32, which became due Oct. 1st, 1876. On the 23d of March, 1877, Thomas Yates recovered a judgment against Moore for \$458.50. January the 14th, 1878, Wm. C. Coney obtained a judgment before a justice of the peace in Iroquois county against Moore for \$175.50. Upon this judgment on the same day an execution was sworn out, which was on the 28th of that month returned, no property found. An affidavit was then made for the issuing of a garnishee process, against Gravelot, in favor of Moore, for the use of Coney, and served on Gravelot the 31st of January, 1878. Gravelot appeared on the 5th of February, 1878, before the justice, and upon a trial there had, a judgment was rendered against him for \$32, from which he appealed to the Circuit Court.

January the 14th, 1878, upon a settlement between Yates and Moore, the latter gave the former an order on Gravelot, as fol-

:

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"Jan'y 14th, 1878.

"Jules Gravelot, pay to Thos. Yates thirty-two dollars and fifty cents, for herding cattle, and this shall be your receipt.

"EDWIN MOORE."

On the trial of the cause in the court below, the following June, Yates, by way of interpleader, set up a claim by virtue of the order against Gravelot, for \$32.50. Previous to that time, Coney knew nothing of Yates' claim, though Gravelot, before the garnishee proceeding, was informed by Yates that he expected to get an order from Moore on him for the amount due Moore, but received no notice of the procurement of the order until after the service of the garnishee summons, when it was presented to him and he refused to accept it for that reason. The Circuit Court rendered a judgment in favor of Yates for \$32, and ordered Coney to pay the costs of suit. It is now insisted by the attorney for Yates, that the order drawn by Moore in his favor on Gravelot operated as an assignment to him of the debt due Moore, and therefore Gravelot could not be garnished by Moore's creditors.

This position is countenanced by some authorities, which are mostly based upon the supposition that an order or draft, drawn on a particular fund, and so drawn as to include the whole fund in the hands of the drawee, operates as an assignment of the debt. Here it will be observed that the order was for \$32.50 only. This sum had been due from Gravelot upwards of a year, and Moore was entitled to interest from the time it was agreed to be paid. Hence the order did not call for the entire fund, and in such case the doctrine is well settled that it is not an assignment of the debt until after the drawee has assented to it by an acceptance.

Moreover, it may be well doubted, whether from the order itself it sufficiently appears to be drawn on a particular fund, even if drawn for the entire amount due. *Kelly v. Mayor of Brooklyn*, 4 Hill, 263; *Kimball v. Donald*, 20 Mo. 579.

Again, it will be found that many of the cases referred to hold the doctrine that a draft, even upon a special fund, operates as an assignment only from the time of acceptance by the drawee. Thus in *Mandeville v. Welch*, 5 Wheat. 277,

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referred to, "it is said that a bill of exchange is in theory an assignment to the payee of a debt due the drawer." This is undoubtedly true where the bill has been accepted, whether it be drawn on a general or specific fund, and whether the bill be in its nature negotiable or not; for in such case the acceptor, by his assent, binds and appropriates the funds for the use of the payee, and to this effect are the authorities cited at bar. *Yates v. Groves*, 1 Ves. Jun. 280; *Gibson v. Minet*, per Byre, C. J. 1 H. Bl. 596-603; *Tattock v. Harris*, 3 T. R. 174.

In cases also where an order is drawn for the whole of a particular fund, it amounts to an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hand. But where the order is drawn, either on a general or a particular fund for a part only, it does not amount to an assignment of that part, or give a lien against the drawee unless he consents to the appropriation by an acceptance of the draft.

The case of *Morris, Adm'r et al. v. Cheney*, 51 Ill. 451, was a proceeding in chancery, and the court recognized the doctrine of equitable assignment, even without the assent of the debtor, but also held "that such assignee in order to perfect his title against the debtor, must give immediate and prompt notice of the assignment to him. Still if he does not give such notice, it does not destroy his right but exposes it to be overreached by a subsequent assignment to another." So in this case, Yates having given no notice to the debtor after he had obtained the order from Moore (though there had been some loose talk in his presence that Yates expected to procure an order, this did not amount to a notice that one had been actually obtained), he was therefore overreached by the garnishee proceeding of Coney against Gravelot.

If the order was as counsel seem to admit, a negotiable instrument, then it would follow that it did not operate as an assignment of the debt due from Gravelot to Moore. In *Cowperthwait v. Sheffield*, 1 Sandf. 416, *Vanderpool, J.*, said: "If these bills had been in the form of orders for the entire proceeds of the shipment, they might, after notice to the drawee, have operated as an assignment of such proceeds. But they would not have possessed all the characteristics of bills of exchange. If in

such form they could be negotiated, they would on their face convey information to every holder of the fund on which they were drawn. In *Cutts v. Parks*, 12 Mass. 209, the drawee consented to the assignment by acceptance, and it so appears in *Morton v. Naylor*, 1 Hill, 583; and in *Robbins v. Bacon*, 3 Greenl. 346, referred to, the order had been presented to the drawee before the service of the trustee process.

That the order in this case operated at law as an assignment of the debt due from Gravelot to Moore under the circumstances, we are not prepared to hold.

Parsons, in his treatise on Notes and Bills, vol. 1, 331, remarks: "that there may be some dicta to the effect that a bill of exchange is an assignment, but no case that we are aware of with the exception of one, has held this doctrine in an unqualified way, and that case must be considered as overruled. The doctrine is well settled that before acceptance, a negotiable bill for a part of the fund is no assignment, but becomes one on the drawee signifying his assent by accepting the bill."

It may be remarked that this was a proceeding at law, and it is only legal rights that are the subject of inquiry. *May v. Baker*, 15 Ill. 89.

Courts of law will doubtless protect the equitable owner of choses in action whenever they can do so without interfering with the rights of innocent parties, and the cases referred to by appellee do not push the doctrine any farther than this.

Will it be questioned that if Gravelot had paid Moore the amount due him, or had accepted a subsequent order drawn by Moore before notice of the prior order to Yates, that the payment in the one case, and his liability in the other, would have been perfectly effectual?

That Coney's rights as attaching creditor of Moore should be protected to the same extent as a *bona fide* purchaser of a subsequent order after acceptance without notice of the prior one, is settled by the cases of *Manning v. McClure et al.*, 36 Ill. 490; *Butler v. Haughwaut et al.* 42 Ill. 18.

The idea suggested, that it was the duty of Coney to have brought Yates, by notice or otherwise, before the justice upon the trial of the garnishee proceeding, thereby affording him

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an opportunity to assert his claim, is the very opposite of what ought to have been done, so far as Yates is concerned.

The judgment is reversed and the cause remanded.

Reversed and remanded.

PHILIP REITZ ET AL.

V.

THE BOARD OF TRUSTEES, etc.

SUIT ON BOND—VARIANCE.—A declaration upon a bond alleging its execution by the principal and sureties, is not supported by proof of one executed by the sureties alone.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed January 14, 1879.

Messrs. HILL & DIBBELL, for appellants; contending that the signature of the principal was essential to make the bond binding upon him, cited *People v. Hartley*, 21 Cal. 585; *Sacramento v. Dunlap*, 14 Cal. 421; *Hall v. Parker*, 37 Mich. 590; *Curtis v. Moss*, 2 Rob. (La.) 267; *Bean v. Parker*, 17 Mass. 603; *Wood v. Washburn*, 2 Pick. 24; *Bouv. Law Dic.* Title "Deed;" *Wharton's Law Lexicon* title "Deed;" 4 *Kent's Com.* 450; *Rev. Stat.* 1874, 966.

Without the signature of the principal the bond is incomplete and the sureties are not bound, the liability of sureties is to be strictly construed: *Covington v. Smith*, 78 Ill. 250; *Cooper v. The People*, 85 Ill. 417; *Miller v. Stuart*, 9 Wheat. 702; *Martin v. Thomas*, 24 How. 315; *Trustees v. Otis*, 85 Ill. 179; *Church v. Noble*, 24 Ill. 292; *Chilton v. The People*, 66 Ill. 501; *Roberts v. Parlin*, 81 Ill. 230; *Polak v. Everett*, 3 Cent. Law Jour. 307; *Organ v. Allison*, 9 Chicago Legal News, 250; *Wood v. Steele*, 6 Wall. 80; *Pothier on Obligations*, Chap. 6, § 1; *Curtis v. Moss*, 2 Rob. (La.) 367; *Ferry v. Burchard*, 21 Conn. 602; *Martin v. Thomas*, 24 How. 315; *Bean v. Parker*,

17 Mass. 603; Wood v. Washburn, 2 Pick. 24; Russell v. Anable, 109 Mass. 72.

Where the defect in the execution of the bond appears upon the face of the instrument, or where the obligee is chargeable with notice of such defect, the bond is void: Villere v. Brognier, 3. Mart. (La.) 349; Wells v. Dill, 1 Mart. N. S. 592; Dair v. U. S. 16 Wall. 5; Butler v. U. S. 21 Wall. 275; Fletcher v. Leight, 4 Bush, 303; Sharp v. U. S. 4 Watts, 21; Marpel v. Franz, 76 Pa. St. 88; State Bank v. Evans, 15 N. J. 155; Wood v. Chum, 18 Gratt. 801; Fletcher v. Baxter, 11 Vt. 447; Passumpsic Bank v. Goss, 31 Vt. 315; Deardorff v. Foreman, 24 Ind. 481; Webb v. Baird, 27 Ind. 368; Wild Cat Branch v. Ball, 45 Ind. 213; Hall v. Parker, 37 Mich. 590.

The liability of the sureties, if any exists, is only for money actually in the hands of their principal at the time the bond was executed, and for such as was received by him thereafter: Vivian v. Otis, 24 Wis. 518; Bouvee v. U. S. 17 How. 437; U. S. v. Earhart, 9 Chicago Legal News, 304; Kagay et al. v. Trustees, 68 Ill. 75; Farrar v. U. S. 5 Pet. 373; U. S. v. Boyd, 15 Pet. 187; U. S. v. Lynn, 1 How. 104.

The books kept by appellant as treasurer, are *prima facie* evidence of the correctness of his accounts: 1 Phil. Ev. 333; Waldon v. Sherburne, 15 Johns. 409; Jones v. Jones, 4 Hen. & M. 447; Morris v. Hurst, 1 Wash. C. C. R. 443; Randall v. Blackburne, 50 Taunt. 245.

In actions on penal bonds, the condition should be set out and specific breaches assigned: People v. McHatton, 2 Gilm. 731; County of Greene v. Bledsoe, 12 Ill. 267; Hibbard v. McKindley, 28 Ill. 240.

Interest cannot be recovered in an action upon such bond: City of Pekin v. Reynolds, 31 Ill. 530; Ill. Cent. R. R. Co. v. Cobb, 72 Ill. 148; State v. Blakemore, 7 Hiesk. 638; Chicago v. Adcock, 10 Chicago Legal News, 147.

Interest where not agreed to be paid, is recoverable only when there has been vexatious delay in making payment: Sammis v. Clark, 13 Ill. 544; Hitt v. Allen, 13 Ill. 592; Aldrich v. Dunham, 16 Ill. 403; Davis v. Kenaga, 51 Ill. 170.

The judgment was erroneous in directing satisfaction of the

bond upon payment of damages and costs: *People v. Compher*, 14 Ill. 447; *Frazier v. Laughlin*, 1 Gilm. 185; *Odell v. Hole*, 25 Ill. 204.

Mr. G. D. A. PARKS, for appellee; that the statute only requires the bond to be executed by the treasurer, and the form is immaterial, cited *Magner v. Knowles*, 67 Ill. 325.

If insufficient under the statute it would be good as a voluntary bond: *Pritchett v. The People*, 1 Gilm. 525; *Young v. Mason*, 3 Gilm. 55; *Fournier v. Faggott*, 3 Scam. 347; *Smith v. Whitaker*, 11 Ill. 417; *Richardson v. The People*, 85 Ill. 498.

It is immaterial in what part of the instrument the name appears, if it appears somewhere, and was intended as a complete execution: *McConnell v. Brillhart*, 17 Ill. 354; *Wise v. Ray*, 3 Iowa, 430; *Classon v. Bailey*, 14 Johns. 486; *Lobb v. Stanley*, 48 E. C. L. 581; *Anderson v. Harold*, 10 Ohio, 399; *Davis v. Shields*, 24 Wend. 323; *Saunderson v. Jackson*, 2 Bos. & Pul. 238; *Johnson v. Dodgson*, 2 M. & W. 653; *Browne on Statute of Frauds*, § 357; 2 *Parsons on Contracts*, *288; 7 *Bac. Abr.* 242; 4 *Cruise's Dig.* 100.

The signing need not be in juxtaposition to the seal: *Davis v. Burton*, 3 Scam. 41; 4 *Cruise's Dig.* 9; *Argenbright v. Campbell*, 3 Hen. & M. 144.

In doubtful cases a covenant should be construed most beneficial to the covenantee: *Marvin v. Stone*, 2 Cow. 781; *McCarty v. Howell*, 24 Ill. 341; *City of Alton v. Transportation Co.* 12 Ill. 38; *Massie v. Belford*, 68 Ill. 290; *Broom's Maxims*, 540.

The defect, if any, in execution of the bond must be known to the obligees, or the sureties will be bound: *Smith v. Peoria Co.* 59 Ill. 412; *Ladd v. Board of Trustees*, 80 Ill. 233; *Ins. Co. v. Brooks*, 3 Am. Law Reg. 400; *State v. Potter*, 3 Am. Law Reg. 176.

The sureties are liable for moneys in the hands of their principal, though received during preceding terms of office: *Pinkstaff v. People*, 59 Ill. 148; *Kagay v. School Trustees*, 68 Ill. 75; *Morley v. Town of Metamora*, 78 Ill. 394; *U. S. v. Earhart*, 9 Chicago Legal News, 304; *Wilson v. School Directors*, 2 Am. Law Reg. 123.

They may show, if they can, that the moneys were lost or

squandered before their liability commenced: *Vivian v. Otis*, 24 Wis. 518.

In case of failure to produce, on demand, the notes and moneys shown to have been received by him, the amount of the same would be the measure of damages: *Sedgwick on Measure of Damages*, 488.

The board of trustees had no power to allow commissions to the treasurer: *Brandt on Suretyship*, § 476; *Decatur v. Vermillion*, 77 Ill. 317; *Dillon on Municipal Corporations*, § 173.

It is the duty of an officer to pay over to his successor the balance remaining in his hands after demand, and failing to do so, interest on the same may be recovered: *Magner v. Knowles*, 67 Ill. 325; *People v. Gasherie*, 9 J. R. 71; *Slingerland v. Swart*, 13 J. R. 256; *Greenly v. Hopkins*, 10 Wend. 97; *Sedgwick on Measure of Damages*, 378.

PILLSBURY, P. J. The appellees brought an action of debt against the appellants upon the bond of Reitz as school treasurer, and the other appellants as his sureties.

The declaration counts upon a bond executed by the principal, Reitz, as well as by his sureties; to which Reitz filed the plea of *non est factum*, verified by his affidavit.

The bond introduced in evidence does not, on its face, purport to be executed by Reitz, and he objected to its introduction in evidence upon that ground; but the court overruled the objection and admitted the bond.

We are of the opinion that in this respect the court erred. A declaration upon a bond alleging its execution by the principal and sureties, is not supported by proof of one executed by the sureties alone. *Bean v. Parker*, 17 Mass. 603.

Counsel have argued the question whether sureties are liable in any event upon such bond, but as the case must be tried again we refrain from expressing any opinion upon that point at this time.

For the error indicated the judgment of the court below must be reversed and the cause remanded, with leave to the appellees to amend their declaration if they shall be so advised, when the liability of the sureties can be properly determined.

Reversed and remanded.

Reid et al. v. Gunnison.

SIMON REID ET AL.

v.

JOHN GUNNISON.

RELIEF IN EQUITY.—The lien of appellants' judgment was subject to a certain mortgage upon the land, but prior to a contract of sale with one M. for a portion of the land, and could have been enforced without regard to such contract; but appellants in their prayer for relief, electing to abide by the contract with M., it was not error to decree an application of the money paid by M. to the payment of the mortgage, and that M. should have the land free from appellants' lien.

APPEAL from the City Court of Aurora; the Hon. FRANK M. ANNIS, Judge, presiding. Opinion filed January 14, 1879.

Mr. EUGENE CANFIELD, Mr. N. F. NICHOLS and Mr. M. O. SOUTHWORTH, for appellants; that the relief granted by the court was entirely outside of the prayer of the bill, and erroneous, cited *Heath v. Hurless*, 73 Ill. 323; *Ward v. Enders*, 29 Ill. 519; *Hall v. Towne*, 45 Ill. 493; *Dodge v. Wright*, 48 Ill. 382.

No estoppel can be raised against appellants from an allegation in their cross-bill of a fact occurring months previous: *Straus v. Minzesheimer*, 78 Ill. 492; *International Bank v. Bowen*, 80 Ill. 541; *Kinnear v. Mackey*, 85 Ill. 96; *Ball v. Horton*, 85 Ill. 159; *Hefner v. Vandolah*, 57 Ill. 520; *Chandler v. White*, 84 Ill. 435; *St. Joseph M'f'g Co. v. Daggett*, 84 Ill. 556.

Mr. CHARLES WHEATON, for appellee; that the decree was equitable, and should be sustained, cited 2 Story's Eq. Jur. § 1316; *Weaver v. Poyer*, 79 Ill. 417.

PILLSBURY, P. J. The lien of the judgments of appellants was subject to that of the Gunnison mortgage, but was prior to any claim of Moore upon the land by virtue of his contract of purchase with Smith and Gunnison. The appellants, therefore could, had they so desired, have enforced such lien subject to the mortgage, without regard to the contract of Moore; but instead of so doing they filed a cross-bill setting up the Moore

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contract, and alleging that the purchase price, \$900, should be applied in discharge of the prior lien, and that the premises were so situated that it would be for the interest of the parties when such interest should be ascertained by the court, and their respective equities therein and thereon adjusted, to have said premises sold, and the money arising from such sale should be paid to the parties as to equity should appertain, and prays for such relief, and that they might have the benefit of the Moore contract.

Moore's contract included only a portion of the premises upon which the judgments and mortgage were a lien, and the price agreed to be paid by Moore for such portion was all the land was worth at time of his purchase.

The court below decreed that the \$900 should be applied in payment of the Gunnison mortgage, but that Moore should have the land discharged of any lien of the judgment or the mortgage. We are of the opinion that this action of the court was proper. The appellants elected to ratify the contract, and have Moore's money applied to their benefit in the extinguishment of the prior lien upon the whole premises, and it would be exceedingly inequitable for appellants to thus take and apply his money and then subject the land to the payment of their judgment.

The court in the decree substantially granted the relief asked for by appellants, and as the decree appears to us to be very equitable and sustained by the pleadings and proofs, it will be affirmed.

Decree affirmed.

ALONZO LEACH

v.

JAMES G. ELWOOD ET AL.

1. TRESPASS—DOGS RUNNING AT LARGE—AUTHORITY OF CITY TO PROHIBIT.—The legislature, by virtue of its police power, may confer upon a city authority to pass an ordinance declaring what shall be considered a

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nuisance, and for its abatement; and may also, when necessary for the public safety, authorize dangerous animals to be summarily destroyed by city authorities without notice to the owners. . . The killing of a dog running at large in violation of an ordinance prohibiting the same, is not such an unauthorized proceeding as will create a liability for its loss.

2. PRACTICE—JUDGMENT WHERE ISSUE UNDISPOSED OF.—It was error to render final judgment on demurrer while the issue on a plea of one defendant remained undisposed of.

ERROR to the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed January 17, 1879.

Messrs. MUNN & MUNN, for plaintiff in error; that the ordinance being operative or inoperative, at the will of the mayor, was in effect an unauthorized delegation of power to him, and therefore void, cited *East St. Louis v. Wehrung*, 50 Ill. 28.

The law recognizes the right of property in dogs: *Pickering v. Orange*, 1 Scam. 338; *Spray v. Ammerman*, 66 Ill. 309; *Kightlinger v. Egan*, 75 Ill. 141.

Mr. O. B. GARNSEY, for defendants in error; that the judgment was proper, cited *Bouv. Law Dict.* title "Judgments;" *Ward v. Stout*, 32 Ill. 399; *Miles v. Danforth*, 37 Ill. 156; *Mt. Carbon R. R. v. Andrews*, 53 Ill. 177.

Error must be affirmatively shown, and there is nothing in the record to show that, as to the city, there was not a hearing on the merits: *Gardner v. Russell*, 78 Ill. 292; *Hough v. Baldwin*, 16 Ill. 293; *Reeves v. Mitchell*, 15 Ill. 297; *Casey v. Harvey*, 14 Ill. 45.

The killing was justifiable, being an exercise of the police power: *Brent v. Kimball*, 60 Ill. 211; *Tower v. Tower*, 18 Pick. 342; *Blair et al. v. Forehand*, 100 Mass. 136; *Carter v. Dow*, 16 Wis. 298; *Cummings v. Perham*, 1 Met. 555; *Morey v. Brown*, 42 N. H. 373.

As to the power to regulate nuisances: *Lake View v. Rosehill Cemetery Co.* 71 Ill. 191; *Daniels v. Hilgard*, 77 Ill. 640; *Brush v. Lemma*, 77 Ill. 496; *C. B. & Q. R. R. Co. v. Haggarty*, 67 Ill. 113.

SIBLEY, J. The plaintiff in error brought an action of

trespass in the Circuit Court of Will county against James Elwood, James Fanning and the city of Joliet, for shooting his dog, valued at five thousand dollars. The city pleaded not guilty, upon which issue was joined, and the defendants, Elwood and Fanning, filed two pleas: First, not guilty, and 2nd a special plea, as follows:

“And for a further plea in this behalf, said defendants, impleaded with said city of Joliet, by leave, etc., say *actio non*, because they say that at and before the time, etc., in said plaintiff's narr. mentioned, said defendant, the city of Joliet, was a municipal corporation, duly organized under the laws of this State, and the Common Council of said city had power and authority, by virtue of such laws, by ordinance, to prevent and regulate the running at large of dogs, and to authorize the destruction of the same when at large contrary to ordinance; and these defendants further aver that said city had, before the time when, etc., in said plaintiff's narr. mentioned, provided by ordinance that the mayor of said city might, from time to time, on an alarm of mad dogs, prohibit, by notice in some public newspaper or printed hand-bills, all dogs running at large within the city limits of said city of Joliet, and might appoint deputy marshals with the authority to kill all dogs found at large within their said city or its limits; that such prohibition should continue as long as, in the discretion of said mayor, should be required, and until public notice should be given by said mayor of the discontinuance thereof. And these defendants aver that said James G. Elwood, defendant herein, was at and before the time when, etc., in said narr. mentioned, mayor of said city of Joliet aforesaid; and further aver that before the time when, etc., there was an alarm of mad dogs in said city of Joliet aforesaid, and that before the time when, etc., the said defendant as such mayor, on such alarm of mad dogs being had, did prohibit all dogs from running at large within the limits of said city of Joliet aforesaid, by notice by printed hand-bills, that all dogs within the limits of said city should be muzzled, and that all dogs found upon the public streets of said city of Joliet, unmuzzled and running at large within the limits of said city,

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would be shot; and afterwards and before the time when, etc., said mayor appointed this defendant, Fanning, a deputy marshal of said city, and authorized him as such deputy, under the provisions of said ordinances, to kill all dogs and sluts found running at large and unmuzzled, and upon the public streets of said city within the limits of said city, of all which said plaintiff had notice. And these defendants aver that at the time when, etc., said ordinance was in full force, and that said prohibition of said mayor was in full force, and had not been discontinued by notice from said mayor or otherwise; and defendants aver, that at the time when, etc., said dog in said plaintiff's narr. mentioned, was running at large and unmuzzled on the public streets of said city of Joliet, and within the limits of said city, to wit: on Desplaines street, and that this defendant, Fanning, acting as such deputy marshal, and not otherwise; and while said ordinance and prohibition of said mayor was in full force, and while such dog was running at large and unmuzzled as aforesaid, did shoot and kill said dog, which is the same trespass in each and every count in said plaintiff's narr. mentioned and described, and none other; this they, these defendants, are ready to verify, wherefore, etc."

The plaintiff demurred to the second plea of defendants, Elwood and Fanning, although the demurrer commences by calling it the plea of the city of Joliet and James D. Elwood, and concludes by praying judgment as to the defendants, Fanning and Elwood. The court overruled the demurrer, and the plaintiff elected to stand by it; whereupon judgment was rendered against him for costs and in favor of all of the defendants. To which ruling of the court the plaintiff excepted, and has brought the record here assigning for error the action of the court in the disposition of the case.

We are unable to discover any substantial objection to the plea.

That the legislature by virtue of its police power for the security of the public welfare, had the right to confer authority upon the city of Joliet to pass the ordinance described in the plea is not questioned, and that the city was empowered by its charter, or even under the general incorporation law, by which

it is asserted its powers were being exercised (of the fact however, we are wholly unapprised) to pass an ordinance like the one referred to, declaring what should be deemed a nuisance, and providing for its abatement is equally evident.

It was so held in *Blain v. Hutchinson*, 100 Mass. 136, on a question similar to the one in dispute, that "the legislature may not only provide that certain kinds of property may be seized and confiscated upon legal process after notice and hearing, but may also, when necessary to insure the public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner."

It is doubtless true that this power cannot be extended to include objects which are not in their nature offensive or dangerous to the community, but dogs running at large in the streets of a populous city, as we have seen under the circumstances alleged in the plea, may well be considered an evil that can be dealt with in a summary manner. The right of society to protect itself against such dangerous animals is in its very nature an inherent one, and he who fails to observe any reasonable regulation of a municipality restraining them from so jeopardizing the safety of the inhabitants of the city must take the consequences of his own neglect.

While it may be true that owners have a certain right of property in their dogs, not recognized at common law, nevertheless they are, even when domesticated, of that wild nature and destructive instincts which renders the animal subject to any reasonable police regulations that have been established by the proper authorities to protect society against their depredations. Hence the owner can be compelled to keep his dog in such a manner as not to endanger the rights of others. If, then, the animal was running at large in violation of the ordinance, as stated in the plea, after having been declared a nuisance, by being allowed to do so it would seem to follow that the city authorities had a right to abate the nuisance, and that the most effectual way of accomplishing this purpose was taken, cannot upon principle or reason be considered an unauthorized proceeding.

A fine perhaps would, if imposed, have been more desirable

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to the owner, but less security to the citizens, and we are not prepared to say that the city authorities exceeded their powers. Nor is any serious objection discovered to the means adopted for carrying into effect the ordinance. Therefore, the court committed no error in overruling the demurrer to the plea.

Still the judgment of the Circuit Court must be reversed, for the reason it does not appear that the issue on the plea of not guilty by the city was ever disposed of. The point is made that judgment having been pronounced on the demurrer to a plea by two of the defendants, the cause was at an end as to all of them, since a judgment could not be rendered in favor of one on the law and another on the facts.

This could, however, have been easily obviated by suspending any judgment upon the demurrer until the issue of fact was determined. Judgment reversed and cause remanded.

Reversed and remanded.

ALBERT F. LOGAN

v.

JAMES N. BURR.

PRACTICE—JUDGMENT AGAINST ONE DEFENDANT ALONE.—Where the principal and two sureties were sued jointly upon a promissory note, service being had upon both the sureties, it is error to render judgment against one of the sureties alone, there being no default, assessment of damages, or other action of the court as to his co-surety.

APPEAL from the Circuit Court of Henderson county; the Hon. ARTHUR A. SMITH, Judge, presiding. Opinion filed January 17, 1879.

Mr. RAUS COOPER and Messrs. KIRKPATRICK & HANNA, for appellant; that judgment must be against all who are served or none, cited Russell v. Hogan, 1 Scam. 552; Hoxey v. County of Macoupin, 2 Scam. 36; Tolman v. Spaulding, 3 Scam. 13;

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Wight v. Meredith, 4 Scam. 360; Howell v. Barrett, 3 Gilm. 433; Davidson v. Bond, 12 Ill. 84; Dow v. Rattle, 12 Ill. 373; Fuller v. Robb, 26 Ill. 248; People v. Organ, 27 Ill. 27; Gribben v. Thompson, 28 Ill. 61; Briggs v. Adams, 31 Ill. 486; Stewart v. Peters, 33 Ill. 384; Flake v. Carson, 33 Ill. 518; Faulk v. Kellums, 54 Ill. 189; Gould v. Sternburgh, 69 Ill. 531.

As to the effect of an alteration of the note upon the liability of the surety, and its use as evidence: Hodge v. Gilman, 21 Ill. 441; Walters v. Short, 5 Gilm. 252; Gillett v. Sweat, 1 Gilm. 475; Montag v. Linn, 23 Ill. 551; Lowman v. Aubery, 72 Ill. 619; Harper v. The State, 7 Blackf. 61; 1 Smith's Lead. Cas. 957; Master v. Miller, 4 T. R. 320; Wilde v. Armsby, 6 Cush. 314; 2 Parsons on Notes, 549; Garrard v. Haddan, 67 Pa. St. 82; Elbert v. McClelland, 8 Bush. 577; Goodman v. Eastman, 4 N. H. 455; Gardiner v. Harback, 21 Ill. 129; Burwell v. Orr, 84 Ill. 465; Schnewind v. Hackett, 54 Ind. 248; Harsh v. Klepper, 28 Ohio St. 200; Draper v. Wood, 112 Mass. 315; Fay v. Smith, 1 Allen, 477; McGrath v. Clark, 56 N. Y. 34; Wood v. Steele, 6 Wall. 80.

Messrs. STEWART, PHELPS & GRIER, for appellee.

LELAND, J. This was an action of assumpsit on a promissory note signed by Daniel Mitchell, Thomas Mitchell and Albert F. Logan, the first named being the principal and the last named two securities. The summons was for all of them and the declaration was against all, reciting that all had been summoned. Thomas Mitchell, however, was not served with process; the other two were duly served. There was a trial of issues by jury as to Logan, and there was a judgment against him alone. There was no default as to Daniel Mitchell, no assessment of damages, no action whatever of the court as to him. That it was error to render judgment against Logan alone is well settled. Gould v. Sternburg, adm'x, 69 Ill. 531; Faulk v. Kellums, 54 Ill. 189, and other previous cases.

Logan's claimed defense to the note was that when it was written and signed by him it was for fifteen per cent. interest,

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and that it was afterwards altered without his consent by erasing the letters "fif," so as to leave it teen (ten) per cent. As the evidence as to whether this was an alteration with or without the consent of Logan may be different in another trial, we do not deem it necessary to say anything in relation to that branch of the case.

For the error aforesaid the judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN BULMER

v.

WILLIAM WORTHING ET AL.

PRACTICE—BILL OF EXCEPTIONS.—Where the bill of exceptions does not purport to contain all the evidence, it must be presumed that there was evidence sufficient to sustain the finding.

APPEAL from the County Court of Grundy county; the Hon. SAMUEL B. THOMAS, Judge, presiding. Opinion filed January 17, 1879.

Messrs. HALEY & O'DONNELL, for appellant; that on appeals from a justice the trial is *de novo*, cited *Waterman v. Bristol*, 1 Gilm. 593; *Tindall v. Meeker*, 1 Scam. 137; *Frye v. Tucker*, 24 Ill. 181; Rev. Stat. 1877, Chap. 79, § 74; *Webb v. Lasater*, 4 Scam. 544; *Thompson v. Sutton*, 51 Ill. 213.

Objections to the admission of testimony must be made in the court below: *Gardner v. Eberhart*, 82 Ill. 316; *People v. Gray*, 72 Ill. 343; *Johnson v. Adleman*, 34 Ill. 265; *Hanford v. Obrecht*, 49 Ill. 146; *Powell v. Teeley*, 49 Ill. 143.

When specific objections are made, none of which are tenable, others will be regarded as waived: *Wickenkamp v. Wickenkamp*, 77 Ill. 92; *Litieich v. Mitchell*, 73 Ill. 603; *Snyder v. Lafromboise*, Breese, 343; *Karnes v. The People*, 73 Ill. 279.

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Messrs. JORDAN & STOUGH, for appellees; upon the question of set-off, and what may be allowed, cited *Newhall v. Turney*, 14 Ill. 338; *Griggs v. James et. al.* Breese, 143; *Hinckley v. West*, 4 Gilm. 136; *Burgwin v. Babcock*, 11 Ill. 28; *Hilliard v. Walker*, 11 Ill. 644; *Ryan v. Barger*, 16 Ill. 28.

As to consolidation of suits before justices: *Lathrop v. Hayes*, 57 Ill. 279; *Brookbank v. Smith*, 2 Scam. 78; Rev. Stat. 1874, 645, § 49.

PER CURIAM. This case was commenced before a justice and appealed to the County Court, where upon trial a judgment was rendered in favor of plaintiffs, and defendant appealed to this court.

The bill of exceptions in this case does not purport to contain all the evidence introduced in the court below, hence we must presume that the evidence was sufficient to sustain the finding.
Judgment affirmed.

JOHN M. ROCKENFELLER ET AL.

v.

HENRY TOBIAS ET AL.

BILL OF EXCEPTIONS—WHAT MUST BE SHOWN IN.—The bill of exceptions not containing the affidavits read on motion for new trial, nor the instructions given or refused, nor purporting to contain all the evidence, the presumption is that the facts were sufficient to sustain the verdict, and that proper instructions were given. Copying instructions into the transcript by the clerk does not make them a part of the record.

APPEAL from the Circuit Court of Woodford county; the Hon. JOHN BURNS, Judge, presiding. Opinion filed January 17, 1879.

Mr. H. N. RYAN, for appellant; upon the question of liability as guarantor, cited *Newland v. Harrington*, 24 Ill. 206; *Wain v. Walters*, 5 East 10; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Jenkins v. Reynolds*, 3 Brod. & B. 14; First Bap.

Bullock v. Carpenter.

Church v. Hyde, 40 Ill. 150; Packard v. Richardson, 17 Mass. 126; Chilcote v. Kile, 47 Ill. 88.

Where the verdict is contrary to the evidence, it will be set aside: Miller v. Hammers, 51 Ill. 175; Adams Ex. Co. v. Jones, 53 Ill. 463; Smith v. *Ætna* Life Ins. Co. 49 N. Y. 211; Chase v. Debolt, 2 Gilman. 371; Boyle v. Levings, 24 Ill. 223; Clement v. Bushway, 25 Ill. 200; Van Valkenburgh v. Haskins, 7 Wis. 424.

Messrs. BANGS, SHAW & EDWARDS, for appellees.

PILLSBURY, P. J. The bill of exceptions in this case does not contain the affidavits read on motion for new trial, the instructions given or refused on the trial below, nor purport to contain all the evidence introduced.

The presumption therefore, is that the facts were sufficient to sustain the verdict, and that the court correctly instructed the jury. The fact that the clerk has copied into the transcript what appears to be instructions, does not make them a part of the record. To be considered by this court they must be incorporated into the bill of exceptions. Drew v. Beall, 62 Ill. 164.

The judgment of the court below will be affirmed.

Judgment affirmed.

LOUIS H. BULLOCK

v.

LINUS CARPENTER.

PRACTICE—AMOUNT ENDORSED ON SUMMONS.—It is the settled rule in this State that a plaintiff is limited in his recovery, in actions originating before justices, to the amount endorsed upon the summons.

APPEAL from the County Court of Woodford county; the Hon. J. M. McCULLOCK, Judge, presiding. Opinion filed January 17, 1879.

Bullock v. Carpenter.

Mr. ELIJAH PLANK, for appellant; that a receipt in full is evidence of a settlement, and shifts the burden upon him who would disprove it, cited *Winchester v. Grosvenor*, 44 Ill. 425.

Mr. S. S. PAGE, for appellee.

PILLSBURY, P. J. This suit was commenced by appellee against appellant before a justice of the peace, by summons in the usual form.

The amount of plaintiff's demand, endorsed upon the summons by the justice, was \$55.60, and on the trial before the justice the plaintiff was allowed to increase such amount to \$155.60. An appeal being taken to the County Court of Woodford county, a judgment was there rendered in favor of the plaintiff for \$164.80, and the defendant brings the record to this Court by appeal, and among others, assigns for error that the judgment exceeds the amount endorsed on the back of the summons.

That the plaintiff is limited in his recovery to the amount endorsed upon the summons in actions originating before justices, is the settled rule in this State. *T. P. & W. Ry Co. v. Pence*, 71 Ill. 174.

On the trial in the County Court the plaintiff sought to recover for services in nursing the defendant while he was sick at plaintiff's house. At time of such sickness the defendant was boarding with plaintiff, and on the trial gave in evidence a receipt for his board paid to plaintiff, which receipt also expressed upon its face that it was in full of all demands. There was evidence tending to show that plaintiff did not intend to charge the defendant for the extra services in caring for defendant in his sickness. As this case must be tried again, this question whether the plaintiff did or did not intend to make any charge for such services, can be properly submitted to the jury, and if it should appear that such extra care was a gratuity on part of plaintiff he should not now be allowed to recover for it in this action.

We express no opinion upon the weight of the evidence in the case, as the judgment must be reversed and the cause remanded for the error noted.

Reversed and remanded.

Com'rs of Highways v. Village of Rock Falls.

THE COMMISSIONERS OF HIGHWAYS, etc.

V.

THE VILLAGE OF ROCK FALLS.

PRACTICE.—There being no final judgment of the court below, the writ of error is dismissed.

ERROR to the Circuit Court of Whiteside county; the Hon. WILLIAM BROWN, Judge, presiding. Opinion filed January 17, 1879.

Messrs. BENNETT & GREEN, for plaintiffs in error; upon the rule for construction of statutes, cited *Way v. Way*, 64 Ill. 406; *Beardstown v. Virginia*, 66 Ill. 40; *Perteet v. The People*, 65 Ill. 230; *Decker v. Hughes*, 68 Ill. 33; *Zarresseller v. The People*, 17 Ill. 101; *Spring v. Collector of Olney*, 78 Ill. 101.

Messrs. JOHNSON & HOWLAND, for defendant in error; that the tax for road purposes levied on property in a village should be paid to the village treasurer, cited *Baird v. The People*, 83 Ill. 387; *City of Galena v. Com'rs of Highways*, 2 Bradwell, 255.

LELAND, J. This was an action of assumpsit by plaintiffs in error against defendant in error, to recover taxes received by the latter, claimed to belong to the former.

The court below sustained a demurrer to the second count of plaintiff's declaration, and either omitted to render any final judgment, or the clerk has omitted it from the record if rendered. All the other counts were withdrawn.

There being no final judgment of the court below, we cannot do otherwise than to dismiss the writ of error.

Writ of error dismissed.

Village of Crotty v. The People ex rel.

THE VILLAGE OF CROTTY

V.

THE PEOPLE EX REL.

3	465
174s	440
3	465
204s	508

1. **MANDAMUS TO COMPEL ISSUANCE OF LICENSE.**—The passage by a village board of a resolution fixing the amount to be paid for license to keep a dram-shop, cannot be regarded as an ordinance properly passed, wherein the village authorities undertake to exercise the powers regarding licenses vested in villages by the statute, and a party tendering the amount so fixed to be paid for a license, and a bond, is not, by virtue of such resolution, entitled to a peremptory writ of mandamus, requiring the village to issue a license to him.

2. **ORDINANCES—RIGHTS UNDER.**—Ordinances should be general and uniform, operating alike upon all classes of persons in the municipality, yet it has never been held that an ordinance granting license should be so general in its provisions that any person complying with its terms is entitled to receive such license without any regard to his moral fitness to conduct the business

APPEAL from the Circuit Court of LaSalle county; the Hon. JOSIAH MCROBERTS, Judge, presiding. Opinion filed January 17, 1879.

Mr. JOHN H. WIDMER and Mr. E. F. BULL, for appellant; that mandamus will not be awarded except where the right of the relator is clear, and the party sought to be coerced is bound to act, cited *People v. Hatch*, 33 Ill. 9; *County of St. Clair v. The People*, 85 Ill. 396; *The People v. Lieb*, 85 Ill. 485; *The People v. C. & A. R. R. Co.* 55 Ill. 95.

Where the corporate body has a discretion and exercises it, the court cannot control that discretion by mandamus: *The People v. LaSalle County*; *County of St. Clair v. The People*, 85 Ill. 396; *The People v. Forquier, Breese*, 104; *High on Extraordinary Remedies*, § 325; *The People v. Curyea*, 16 Ill. 547.

The common council may grant licenses upon such terms as they may choose, and may prescribe the character of persons who shall have licenses: *Rev. Stat. 1874, Chap. 11, § 62*; *Schwuchow v. Chicago*, 68 Ill. 444; *City of East St. Louis v. Wehrung*, 46 Ill. 392; *ex parte Paine*, 1 Hill 665.

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This being for the relator's personal benefit, a demand and refusal are necessary: High on Extraordinary Remedies, § 13; Rex v. Brecknock, etc. Co. 3 Adol. & Ell. 217; Rex v. Wills, etc. Canal Nav. 3 Adol. & Ell. 477; Regina v. Thames & Isis Nav. 8 Adol. & Ell. 901; Macoupin Co. v. The People, 58 Ill. 191.

Mere delay for investigation is not a refusal: Regina v. Wilts, etc. Canal Co. 8 Dowl. Pr. Cas. 623.

Mr. M. T. MOLONEY, for appellee; that private rights may be enforced by mandamus, cited County of Pike v. The State, 11 Ill. 202; City of East St. Louis v. Wider, 46 Ill. 351; Kadgihn v. City of Bloomington, 58 Ill. 229.

If licenses are granted they should be granted to all who conform to their terms: City of Chicago v. Rumpff, 45 Ill. 90.

If the board by resolution agree to issue license, a mandamus will compel the issuing of the same: 1 Hill, 655; 13 Barb. 206.

The petition is properly brought against the corporation: 18 B. Mon. 9.

PILLSBURY, P. J. Petition for mandamus filed in the LaSalle Circuit Court by the relator, Besse, to compel the village of Crotty, in said county, to grant him a license to sell by retail intoxicating liquors, and to keep a pool table in said village.

The petition alleges that the village is incorporated under the general law, and has power by that law to grant such licenses, and that "at a special meeting of the board May 4th, on motion of Graves, that license to keep dram-shops for the present municipal year be fixed at \$130.00; approved. On motion of Prickett, that said license to keep dram-shops be for every dram-shop \$80.00 in advance and \$50.00 on or before Nov. 1st, 1878; approved," and at same time passed an order as follows:

"On motion of Prickett, that the license to keep billiard tables, bagatelle, pool tables, shooting galleries or other games of chance, be for every such privilege \$5.00; approved."

That no other order, ordinance or resolution is known to exist in said village upon that subject. That on May 9th licenses

were granted under said action of the trustees to several persons, at which time the relater also applied for license to keep pool table and to sell liquor, and in accordance with the laws filed his bond and tendered to the treasurer the amount of money required by said order, etc.

That the authorities refused to approve his bond, accept the money and to act upon his application.

The respondent filed its answer to said petition, admitting the passing of the resolution, the application of the relator for a license to keep a pool table and to sell intoxicating liquors, the tender of the money and the presenting of the bond, and then alleges as a reason for not granting the same, "that the matter of granting a license to said petitioner to keep a dram-shop, and also to keep a pool table, was laid upon the table for the future consideration and action of said board of trustees, to be determined upon at a future meeting of said board; that afterwards, to-wit: on May 24th, 1878, and after the filing of the petition herein, upon careful investigation and consideration of the application for said licenses, made by said president and board of trustees, it was determined by a vote of 4 to 1, in said meeting, that a license to said petitioner should not be granted, and said clerk was then and there instructed to return said bond to said petitioner. The defendant denies that said president and board of trustees refused either to license said petitioner to keep a dram-shop or not to license him, as is alleged in said petition; on the contrary the defendant avers that the matter of granting to said petitioner a license to keep a dram-shop, was deferred solely for the purpose of allowing said president and board of trustees to inquire into the fitness of said petitioner to receive such license; that said petitioner had received a license from the defendant to keep a dram-shop for the previous year, and had kept an ill-governed and disorderly house, to the scandal and disgrace of the inhabitants residing within said corporate limits; that said petitioner, under a license issued to him by the defendant for the year previous, disregarding his duty as a good citizen, and in violation of the ordinances of the defendant, and of the trust reposed in him to keep an orderly and well-governed house, sold and gave intoxicating

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liquors to minors on divers and sundry times, kept said dram-shop open on divers Sabbath days, and sold intoxicating liquors on the same, and sold and gave intoxicating liquors to inebriates and drunken persons, and permitted fighting, quarrelling and other disorderly conduct to be carried on in and about said dram-shop. And the defendant avers that the sole and only reason for refusing to issue a license to said petitioner to keep a dram-shop and pool table, is that the petitioner, in the judgment of said president and board of trustees, is an unfit person to be entrusted with a license to sell spirituous, vinous and malt liquors, or to keep a pool table or a dram-shop within said corporate limits, and that for no other cause did said president and board refuse to grant to the petitioner a license for said purposes; and that in exercising the discretion which the law has vested in the defendant for the good of the inhabitants of said corporation, they did refuse to grant a license to said petitioner for the purposes above stated, and thereupon said clerk did return said bond to said petitioner. Wherefore the defendant prays the judgment of the court here, etc."

To this answer the relator demurred, and the court sustained the same, and awarded a peremptory mandamus as prayed, and the defendant brings the case to this court by appeal.

It will be noticed at the outset that the village has never by ordinance properly passed, approved by the president and published, undertaken to exercise the powers regarding licenses vested in it by the statute, as the resolution cited is the only action ever had upon the subject, and that does not even purport to be an ordinance, but simply a declaration of the amount that shall be paid for such licenses if granted.

The power to license, regulate and prohibit the selling or giving away of any intoxicating liquors is expressly conferred upon cities by the forty-sixth subdivision of section one of article five, of the act of 1872, and to license pool tables by the forty-fourth subdivision of said section; and by section nine of article eleven of same act the president and board of trustees of villages are vested with the same powers of cities in that regard, and can pass ordinances in like manner, and both cities and villages are authorized by the same act to pass all ordinances,

rules, and make all regulations proper or necessary to carry into effect the powers granted to them. It is not to be denied that these ordinances should be general and uniform, operating alike upon all classes of persons in the municipality brought within its provisions, yet it has never been held that an ordinance granting license should be so general in its provisions that any person is entitled to receive such license without any regard to his moral fitness to conduct the business of retailing liquor.

An ordinance providing for the granting of such privilege, and providing that such license should only be granted to law-abiding and moral persons, is not the less general and uniform because it does not include the vicious and immoral.

We have no doubt of the power of a municipal corporation to prescribe that a license to sell liquor shall not be granted to that class of persons who in conducting the business continually do so in violation of the law, and in utter disregard of good morals and the well being of society.

It is essential to good order in the municipality that they should possess this power and freely exercise it.

In the case of the City of East St. Louis v. Wehrung, 50 Ill. 31, it is said that "In the proper exercise of this power the city council should adopt general ordinances prescribing a general rule by which licenses might be obtained. They might no doubt prescribe the character of the persons who might or might not obtain licenses, or they might in their regular or called meetings, in such manner as they might ordain, grant such licenses."

This power to grant licenses and to prescribe general rules by which they can be obtained, has never been exercised by the village of Crotty by general ordinance, hence such power is reserved to it, to be called into exercise when the president and board of trustees shall determine so to do; and this power must be exercised by them alone, and cannot be delegated to any of its inferior officers. City of East St. Louis v. Wehrung, *supra*; Kinmundy v. Mahan, 72 Ill. 462.

It is not necessary in this case to determine the question whether the reason assigned in the answer would be a sufficient excuse for their refusal to grant the relator a license, had the

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president and board of trustees adopted a general ordinance comprehensive enough in its terms to include persons who conduct the traffic in intoxicating liquors in the manner the relator is admitted to have done, as the question does not arise upon this record.

It is evident that they have not so done, and we are not aware of any power in the judiciary to compel them to pass such an ordinance. The mere fact that they have granted license to others without ordinance cannot avail the relator, for until they have ordained that licenses shall be granted in said village, they are under no legal obligation to issue them.

Whether the licenses to the others were properly or improperly granted, we express no opinion, but confine our determination to this: that as there is no ordinance of said village by virtue of which they are under a legal obligation to grant a license to the relator, he cannot have relief by mandamus, and that the president and board of trustees having never deprived themselves of the discretion to prescribe the character of the persons who should receive license, they were justified in refusing one to the relator, who is admitted to so conduct his business as to make it a nuisance.

The judgment of the Circuit Court awarding a peremptory writ of mandamus will be reversed.

Judgment reversed.

THOMAS FORRISTAL

v.

THE PEOPLE EX REL.

1. VACATION OF OFFICE—ELECTION AND QUALIFICATION SUBSEQUENT TO AN APPOINTMENT NOT NECESSARILY A VACATION.—The fact that a person, illegally elected to a municipal office, takes the oath and files his official bond, is not *ipso facto* a vacation of a former valid appointment to the same office; nor is he by such acts estopped from averring that he did not accept the office and enter upon the duties conferred by the void election.

2. HOLDING OVER —If he did not accept the office under the void election, there was nothing to prevent him from continuing to act under the previous valid appointment until his successor was duly elected and qualified.

APPEAL from the Circuit Court of LaSalle county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed January 17, 1879.

Messrs. BLANCHARD & BLANCHARD, for appellant; that this is a criminal proceeding and affected by the same rules of pleading, cited *Donnelly v. The People*, 11 Ill. 552; *The People v. Koener*, 21 Ill. 65; *The People v. M. & A. R. R. Co.* 13 Ill. 66; *Lavalle v. The People*, 68 Ill. 252.

Respondent's first plea established a good title to the office: *Session Laws 1875, 55.*

Nothing less than the appointment of a successor could abrogate respondent's title: *The People v. Fairbury*, 51 Ill. 149; *State ex rel v. Loy*, 64 Mo. 89; *The People v. Tilton*, 37 Cal. 614; *McCall v. Byram Mf'g Co.* 6 Conn. 428; *The People v. Runkle*, 9 Johns. 158; *Stadler v. Delmit City*, 13 Mich. 574; *The People v. Whitmore*, 10 Cal. 38; 1 *Dillon on Municipal Corporations*, § 158.

An officer holding over is an officer *de jure*: *State v. Howe*, 25 Ohio, 588; *The People v. Stratten*, 28 Cal. 44; *Spencer v. Champlin*, 9 Conn. 536; *Cong. Soc. v. Sperry*, 10 Conn. 200; *State v. Seay*, 64 Mo. 89; *Sparks v. Farmers Bank*, 9 Am. Law Rev. 365; *State v. McDaniel*, 22 Ohio St. 354.

Mr. HARRY MAYO and Mr. G. S. ELDREDGE, for appellee; that the election and qualification vacated the former appointment, cited *King v. Hughes*, 5 Barn & C.; *Dillon on Municipal Corporations*, § 164; *Milward v. Thatcher*, 2 T. Rep. 87; *The King v. Ripon*, 1 Ld. Rayned, 563; *The King v. Trelanway*, 3 Burr, 1615; *Gabriel v. Clark*, Cro. Car. 138; *The King v. Goodwin*, Doug. 383; *Willie on Corporations*, 617; *Glover on Corporations*, 139; *The People v. Carigue*, 2 Hill, 93; *Van Osdel v. Hazard*, 3 Hill 243; *Regents, etc. v. Williams*, 9 Gill & J. 365.

Respondent must either deny the intrusion and set out his disclaimer, or justify by setting up a good title: *The People v. R. R. Co.* 1 Lans. 309.

SIBLEY, J. This was an information in the nature of a *quo*

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warranto, commenced by the People in the Circuit Court of LaSalle county, on the relation of James Hastings, mayor of the city of Mendota, against Thomas Forristal, to require him to show by what authority he held and exercised the office of city marshal of the city of Mendota.

To this proceeding Forristal filed two pleas; *first*, setting up that under the provisions of the charter of the city, at the annual meeting of the city council, in April, 1876, he was duly appointed city marshal; that he qualified under the appointment, and entered upon the duties of the office, and continued thereafter to perform the duties of the office, by virtue of such appointment up to the time of the institution of this proceeding; *second*, that at the annual meeting of the city council in April, 1877, by a majority vote of the aldermen, he was declared elected, and that he qualified under such election.

A demurrer was interposed to these pleas, and overruled as to the first, and sustained to the second, when judgment of ouster was entered against the defendant. Afterward, by leave, a replication was filed to the first plea, averring among other things, that Forristal, on the 16th day of April, 1877, ceased to execute the duties of his office by virtue of his appointment set forth in the plea, and disclaimed to exercise the office obtained by means of the appointment stated in that plea, for the reason the city council unlawfully proceeded to fill the office of marshal without any name having been submitted to them by the mayor, and the defendant, after having been so elected, filed his official oath of office, qualified and accepted such election, and afterwards acted and claimed to act solely under that void appointment. The defendant rejoined to this replication as follows:

And now again comes said defendant, and as to plaintiff's replication to defendant's first plea, says, that by reason of anything therein alleged, *actio non*, because he says that said defendant did not on the sixteenth day of April, A. D. 1877, or at any other time, disclaim any right to, or cease to exercise the duties of said office, by virtue of the appointment in said first plea set forth, but has ever since said appointment continued to exercise and perform the duties of said office, in

manner and form as in said plea alleged, and of this the defendant puts himself upon the country.

To which rejoinder the people and the relator demurred. The court sustained the demurrer, and entered judgment of ouster against the defendant. From that judgment the defendant appealed, and the only question necessary to consider is the sufficiency of the rejoinder, for if that is a complete answer to the replication, no judgment of ouster upon either plea could have been properly rendered against the defendant.

There are indeed some nice and very technical rules of pleading discussed by counsel with much ingenuity, but as they do not pertain to the merits of the case, no sufficient reason is discovered for considering them. That Forristal was properly appointed in April, 1876, and had a right to continue over until that appointment had ceased to be operative by the legal election of a successor, or vacated by his own act, is not disputed; and that his election by the city council in 1877, without any nomination by the mayor, was unauthorized, cannot be seriously questioned. Then did the mere unlawful election *ipso facto* determine his right to hold over under the valid appointment of 1876, until his successor was duly elected and qualified? Certainly not. But it is argued that because he filed his oath of office under this void election, he is concluded from averring that he did not accept and enter upon the duties of the office under it. We think that this proposition is untenable. The mere fact of his taking the oath of office after the unauthorized election in 1877, did not necessarily result in his ceasing to perform the duties of the office under the valid appointment of 1876. He may have filed the oath without any intention to or ever accepting the void election of 1877. In that case then there was nothing to prevent him from continuing to act under the appointment of 1876 until his successor was duly elected and qualified. If he had accepted the office attempted to be conferred upon him by the city council in 1877, and that was incompatible with his previous holding (of the incompatibility we express no opinion), the authorities are all to the effect that the office would have been vacated. The rejoinder alleges that Forristal did not disclaim to hold, or cease

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to exercise the duties of his office by virtue of his appointment made in April, 1876, but had continued ever since that appointment to perform the duties of the office under it. As the demurrer admits the facts stated in the rejoinder to be true, we think that the court erred in entering a judgment of ouster against the defendant.

The judgment of the Circuit Court is therefore reversed and the cause remanded.

Judgment reversed.

CHARLES F. WARE

v.

CROFT PILGRIM.

SLANDER—JUSTIFICATION—EVIDENCE.—The action was for words spoken charging the plaintiff with perjury. Defendant pleaded the general issue and justification, and upon the latter plea was the main contest. The evidence was very conflicting, and this court does not find the verdict so far against the weight of evidence as to warrant a reversal.

APPEAL from the Circuit Court of Stark county; the Hon. D. McCULLOCH, Judge, presiding. Opinion filed May 2, 1879.

Mr. C. K. LADD and Mr. B. F. Thompson, for appellant; that testimony as to the social standing of the defendant should have been admitted, cited *Hosley v. Brooks*, 20 Ill. 116; *Harbison v. Shook*, 41 Ill. 142.

Plaintiff should have been allowed to state his *intention* to testify to the truth before the justice: *White v. The State*, 16 Am. Law Reg. 751.

The words charged are actionable and the law implies damages: Rev. Stat. 1877, 933; *McKee v. Ingalls*, 4 Scam. 30; 2 Greenleaf's Ev. § 418; 2 Starkie on Slander, 47; 2 Selw. Nisi Prius, 428; 3 Blackstone, 93; Swift's Ev. 487; *Baker v. Young*, 44 Ill. 42; *Hatch v. Potter*, 2 Gilman. 725; *Gilmer v. Eubank*, 13 Ill. 271; *Hosley v. Brooks*, 20 Ill. 116; *Harbison v. Shook*,

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41 Ill. 142; Zuckerman v. Sonnenschein, 62 Ill. 115; Flagg v. Roberts, 67 Ill. 485; Miller v. Johnson, 79 Ill. 58.

The plea of justification must be proved as laid: Harbison v. Shook, 41 Ill. 142; Strader v. Snyder, 67 Ill. 404; Hicks v. Rising, 24 Ill. 566; Darling v. Barks, 14 Ill. 46; Sandford v. Gaddis, 13 Ill. 329; Anson v. Stuart, 1 T. Rep. 752; Flint v. Pike, 4 Barn. & C. 473; Craft v. Boite, 1 Saund. 244; Maitland v. Goldney, 1 East. 436; Van Ness v. Hamilton, 19 Johns. 349; 1 Greenleaf's Ev. § 58; Story's Pl. 495; Hilliard on Remedies for Torts, 254.

The presumption of law is against the commission of a crime: Sutphen v. Cushman, 35 Ill. 186; Roscoe's Crim. Ev. 16; 1 Greenleaf's Ev. § 34.

The jury are not judges of the competency of the evidence: Harris v. Wilson, 7 Wend. 57.

Instructions should be based on the evidence: Holcomb v. Davis, 56 Ill. 413.

Repetition of the slanderous words may be considered in aggravation of damages: Stowell v. Beagle, 79 Ill. 525; Bush v. Crosser, 1 Kernan, 357; Taylor v. Church, 8 N. Y. 452; Viele v. Gray, 10 Abb. Pr. 6; Folkard's Starkle, 398.

Mr. M. SHALLENBERGER and Mr. M. A. FULLER, for appellee.

PILLSBURY, P. J. This is an action on the case, brought by appellant against the appellee in the Stark Circuit Court, for words spoken by the appellee, charging plaintiff below with perjury and false swearing on the trial of a cause before a justice of the peace.

The defendant below pleaded the general issue and a special plea of justification. A trial was had, and a verdict rendered in favor of the defendant, upon which the court, after overruling a motion for a new trial, entered judgment, and the plaintiff appeals to this court. There is no serious dispute that the plaintiff proved the speaking of the words charged, and the contest below was upon the plea of justification.

Upon this issue the evidence is very conflicting, many witnesses being sworn upon either side, and while we might be

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inclined to find a different verdict, were we trying the case as a jury, we are unable to say that the verdict is so far against the weight of evidence as to require a reversal of the judgment upon that ground.

It is urged that the plaintiff should have been allowed by the court to state whether, on the trial before the justice, his intention was to tell the truth. The plaintiff had already stated to the jury that he believed he was swearing to the truth before the justice, and it was discretionary with the court below to have the question and answer repeated; the plaintiff had all the benefit of such answer, and even if the action of the court in not permitting him to again answer were improper, which we do not now determine, it is an error that did not injure him. We have carefully examined the instructions, and fail to find any material error in them, or the refusing or modification of those asked by plaintiff.

Perceiving no substantial error in the record, the judgment of the court below will be affirmed.

Judgment affirmed.

THOMAS MELLOR

V.

CROFT PILGRIM.

1. DRAINAGE.—The owner of a superior estate cannot by any act of his, acquire the right to collect the surface-water upon his land and discharge it upon the land of his neighbor in streams, or in any manner or quantity different from the natural flow.

2. FLOWING WATER UPON LANDS OF ANOTHER—CONTINUING TRESPASS.—Constructing drains in such a manner as to collect the surface-water upon one's land and discharge it in streams upon his neighbor's, is a continuing nuisance, and successive actions may be brought and sustained as long as such nuisance is continued. The damages are not so permanent and certain in their character as to enable a jury to give compensation at once for the entire injury.

APPEAL from the Circuit Court of Stark county; the Hon. D. McCULLOCH, Judge, presiding. Opinion filed May 2, 1879.

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Mr. C. K. LADD and Mr. B. F. THOMPSON, for appellant; that the judgment and transcript offered by the defendant is conclusive as to the existence of the nuisance, it being between the same parties and concerning the same drain, cited *Nispel v. Laparle*, 74 Ill. 306; *Cransdon v. Leonard*, 4 Cranch, 434; *Mersereau v. Pearsall*, 19 N. Y. 110; *Beloit v. Morgan*, 7 Wall. 619; *White v. Coatsworth*, 2 Seld. 137; *Castle v. Noyes*, 14 N. Y. 329; *Kelsey v. Ward*, 38 N. Y. 83; *Gardner v. Buckbee*, 3 Cow. 120; *Bomehaud v. Dias*, 3 Denio, 238; *Embury v. Conner*, 3 Comst. 522; *Gould's Pl.* 445; *Freeman on Judgments*, § 249; *Peak's Ev.* 36; *Bac. Abr.* title "Pleas."

The injury is continuous, and successive actions may be sustained as long as the cause exists: *McConnell v. Kibbe*, 29 Ill. 485; *Ill. Cent. R. R. Co. v. Grabill*, 50 Ill. 242; *Hazen v. Casey*, 30 Wis. 553; *Johnson v. Long*, 1 Raym'd, 370; 2 *Kent's Com.* 416; 2 *Greenleaf's Ev.* § 472; 3 *Starkie Ev.* 991; 1 *Hilliard on Torts*, 574; *Sedgwick on Measure of Damages*, 155; 2 *Waterman on Trespass*, 244; *Wood on Nuisance*, § 823.

Every continuation is a new cause of action: *Sutton v. Clark*, 6 Taunt. 29; *Phear on Rights of Water*, 100; *Shodwell v. Hutchinson*, 2 Barn. & Ad. 97; *Roswell v. Prior*, 1 Ld. Raym'd. 713; 7 *Bac. Abr.* 639.

Every man must so use his property as not to injure another: *Rudd v. Williams*, 43 Ill. 385; *Ill. Cent. R. R. Co. v. Grabill*, 50 Ill. 242; 2 *Kent's Com.* 440.

Throwing water upon lands of another entitles the injured person to an action: *Stout v. McAdams*, 2 Scam. 67; *Tanner v. Volentine*, 75 Ill. 624; *Wood on Nuisance*, § 105; 2 *Waterman on Trespass*, 234.

Plaintiff is not obliged to receive surface water in different quantities or at different times than it naturally would come to his land: *Clinton v. Myers*, 46 N. Y. 514; *Bellenger v. N. Y. C. R. R. Co.* 22 N. Y. 42; *Pixley v. Clark*, 35 N. Y. 520; *Corning v. Troy Iron, etc. Factory*, 40 N. Y. 199; *Merritt v. Brinkerhoff*, 17 Johns. 319; *Bridgewater v. Trafford*, 1 Barn. & Ad. 874; *Phear on Rights of Water*, 3 *Kent's Com.* 439; *Evans v. Merriweather*, 3 Scam. 492; *Baird v. Williamson*, 15 C. B. (N. S.) 376.

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If the drain threw the water upon plaintiff's land in a different manner or quantity, defendant is liable: *Livingston v. McDonald*, 21 Iowa, 160; *Gillham v. Madison Co. R. R. Co.* 49 Ill. 484; *Bigelow on Torts*, 493; *Wood on Nuisances*, § 121; *Higgins' Law of Watercourses*, 156; *Shears v. Wood*, 7 Mo. 345.

The superior heritor cannot, by a system of drainage collect the water and precipitate it on the land below: *Smith v. Rennick*, 7 C. B. 515; *Dickerson v. Worcester*, 7 Allen, 19; *Butler v. Peck*, 16 Ohio St. 334; *Miller v. Laughbach*, 47 Penn. 154; *Gormley v. Sanford*, 52 Ill. 158; *Nevins v. City of Peoria*, 41 Ill. 502; *Angell on Watercourses*, § 108; *Adams v. Walker*, 34 Conn. 466; *Curtiss v. Eastern*, 98 Mass. 428.

Plaintiff cannot be required to make ditches upon his land for the purpose of receiving the water: *Goodale v. Tuttle*, 29 N. Y. 466.

Although a portion might naturally flow upon plaintiff's land, defendant could not, by ditches, turn the remainder thereon: *Butler v. Peck*, 16 Ohio St. 335; *Kauffman v. Griesemer*, 26 Pa. St. 407; *Martin v. Riddle*, 26 Pa. St. 415; *Washburn on Easements*, 353.

The same rules apply to underground waters, or waters percolating through the soil: *Phear on Rights of Water*, 33; *Broadbent v. Ramsbotham*, 11 Exch. 602; *Pixley v. Clark*, 35 N. Y. 520; *Cooper v. Randall*, 53 Ill. 24.

Generally as to defendant's liability: *Higgins' Law of Watercourses*, 81; *Wormersley v. Church*, 17 L. T. Rep. 190; *Tipping v. Eckersley*, 2 K. & J. 264; *Mayor v. Chadwick*, 11 A. & E. 571; *Laing v. Whaley*, 3 H. & N. 675; *Wood v. Wand*, 3 Exch. 781; *Stockport Co. v. Potter*, 7 H. & N. 160; *St. Helen's Co. v. Tipping*, 11 N. L. Cas. 642.

Upon the question of damages: *Sedgwick on Measure of Damages*, 153; *Tooth v. Clifton*, 22 Ohio St. 247; *Wood v. Wand*, 3 Exch. 772.

Mr. MILES A. FULLER, for appellee; upon the question of a former judgment being a bar, cited *Briscoe v. Loyd*, 64 Ill.

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33; Rogers v. Higgins, 57 Ill. 244; Howell v. Goodrich, 69 Ill. 557; Gibbs v. Cruikshank, Moak's Eng. R. 211.

Where the nuisance is one that will continue without change, then the damage is an original damage, and may at once be fully compensated: Powers v. Council Bluffs, 45 Iowa, 652; Town of Troy v. Cheshire, R. R. Co. 3 Foster, 83.

The owner of the dominant heritage may drain his land for purposes of cultivation, even though an increased flow of water upon the servient estate is thereby created: Swett v. Cutts, 50 N. H. 439; Beard v. Murphy, 37 Vt. 99; Martin v. Riddle, 26 Pa. St. 415; Kauffman v. Grisman, 26 Pa. St. 407; Hays v. Hinnkerman, 68 Pa. St. 324; Sawen v. Schiff, 15 La. An. 681.

Upon the question of damages: Ottawa Gaslight & Coke Co. v. Graham, 23 Ill. 78; Cooper v. Randall, 53 Ill. 24.

PILLSBURY, P. J. The appellee is the owner of a farm in Bureau county, and the appellant of one in Stark county. The farms are separated by a public highway, the center of which is the line between the lands of the parties. The land of the appellee is slightly higher than that of appellant, yet the natural drainage is so gradual as to make no perceptible difference between the two farms relative to the amount of surface-water standing upon them. There is a slight depression upon the land of appellee, extending to and across the highway, and upon and across the land of appellant.

In the spring of 1876 the appellee constructed a tile drain, commencing near said highway and extending northerly along said depression for about twenty rods, thence dividing into two branches, running in a northwest and northeast direction for about forty rods, and ending in a flat or sag. The effect of this drain was at once to make the land of appellee dryer, and to increase the flow of water upon that of appellant, rendering quite a portion of it unfit for pasturage or cultivation. It appears, also, that in June, 1876, Mellor recovered a judgment against Pilgrim for sixteen dollars, before a justice of the peace, for damages sustained by him in consequence of the construction and continuance of said drain up to date of the commencement of said suit. This judgment was never appealed from,

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but was paid by appellee. This suit was commenced in the Circuit Court by appellant, to recover for damages sustained by him since said suit was commenced before the justice.

Upon trial in the Circuit Court verdict and judgment was had against appellant, and he appealed to this court.

That the appellee laid the drain as alleged is not denied; that it caused the water to flow upon appellant's land in increased volume, thereby damaging him, cannot upon this record be successfully controverted.

A party purchasing land over which surface-water naturally flows from that of a coterminous proprietor, takes it with the burden of receiving such surface-waters, and cannot, by drains, dykes or other obstructions, impede or stop such natural drainage to the injury of the owner of the superior heritage; on the other hand, the owner of the superior heritage cannot, by any act of his, acquire the right to collect the surface-waters upon his land by artificial channels, and thus flow his neighbor's land without his consent.

He cannot impose upon the land of an adjoining proprietor without his assent, or at least acquiescence, the additional burden of having the surface-water converted into a stream, when it is discharged upon his land.

He is bound to receive such surface-water as naturally comes to his land, but is not obliged to accept it to his injury in larger quantities or at different times than he otherwise would but for the voluntary act of his neighbor. Such we believe to be the rule in this State: *Gillham v. Mad. Co.* R. R. Co. 49 Ill. 484; *Gormley v. Sandford*, 52 Ill. 158.

This rule does not interfere with the right of the owner of land to make drains upon his own lands, and discharge their contents into natural watercourses, for in the case at bar there can be no pretense even that the depression shown to exist was of that character.

The whole case here is, that the appellee collected the surface-water upon his land, and from some parts of it which did not flow naturally over that of appellant, and discharged it in increased volume upon the farm of appellant. This the law gave him no right to do.

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The instructions given by the court at the instance of the appellee, in so far as they are not in consonance with the views above expressed, are erroneous.

It is argued by counsel that the judgment rendered by the justice of the peace is a bar to the present suit. This position we deem untenable. There would be force in the argument if the injury caused by the construction of the drain went to the destruction of the entire estate, and in that case the authorities cited would be applicable. Here, however, the damages are not so permanent and certain in their character as to enable a jury to give compensation at once for the entire injury. It is in the nature of a continuing nuisance, and in such cases successive actions may be brought and sustained as long as such nuisance shall be maintained.

We have no doubt that the appellant should recover upon the facts in this record.

The judgment must be reversed and the cause remanded for a new trial, when the jury can be instructed in harmony with the rule announced in this opinion.

Reversed and remanded.

JOHN M. McCLELLAND

v.

ICHABOD S. BARTLETT ET AL.

PROMISSORY NOTE—PAYMENT —If a party would be secure in paying negotiable paper to a payee or assignee, before or after maturity, he must see to it that he pays to a holder of the note, and not to one who has been, but is not when payment is made. He should ask to see the notes before he pays them, and should take them up when paid.

APPEAL from the Circuit Court of Kane county; the Hon. T. D. MURPHY, Judge, presiding. Opinion filed May 2, 1879.

Messrs. BOTSFORD & BARRY, for appellants; that Kribs was the general agent of Bartlett, and hence had general powers,

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cited 2 Kent's Com. 620; Doan v. Duncan, 17 Ill. 274; U. S. Life Ins. Co. v. Advance Co. 80 Ill. 549; McGregor v. McDevitt, 64 Ill. 261.

The mortgage was on the public records, and notice to all. Morrison v. Brown, 83 Ill. 562.

Complainant was guilty of no laches: Stevenson v. O'Neal, 71 Ill. 314; Shreeves v. Allen, 79 Ill. 553; Comstock v. Hannah, 76 Ill. 530.

As to ratification of the acts of Kribs: Roby v. Cossitt, 78 Ill. 638; Searing v. Butler, 69 Ill. 575.

Complainant is not responsible for a misapplication of the money paid: Mason v. Bauman, 62 Ill. 76.

Mr. J. W. RANSTEAD, for appellees; that Kribs was not the general agent of Bartlett, and it was the duty of complainant to ascertain the extent of his authority, cited Story on Agency, § 126; Williams v. Merritt, 23 Ill. 623; Smith v. Peoria Co. 59 Ill. 416; Baxter v. Lamont, 60 Ill. 237.

The sale of the notes to complainant was in fraud of the rights of appellees, and they cannot be held responsible therefor: Johnson v. Barber, 5 Gilm. 425; Tuller v. Voght, 13 Ill. 277; Oxford v. Peters, 28 Ill. 434.

Complainant should have ascertained if there was any equitable reason why the mortgage should not be enforced, and failing to do so, must abide the consequences: Olds v. Cummings, 31 Ill. 189; Haskell v. Brown, 65 Ill. 29; Bryant v. Vix, 83 Ill. 11.

If the decree be erroneous only in part, it should be reversed only as to that which is erroneous: Rev. Stat. 1874, Chap. 110, § 82; Laws of 1877, 71, § 10; Enos v. Capps, 12 Ill. 255; De Wolf v. Haydn, 24 Ill. 529; Rees v. City of Chicago, 38 Ill. 322.

Subsequent purchasers in good faith of the lots, without notice of any equities between complainant and Bartlett, ought not to be prejudiced: Prevo v. Walters, 4 Scam. 35.

LELAND, J. This was a bill to foreclose a mortgage filed by John M. McClelland, who claimed to be the holder by assign-

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ment of two promissory notes for \$800 each, secured by mortgage given by Ichabod S. Bartlett to Edward S. Wilcox, assigned by him to his brother, John S. Wilcox, and delivered to McClelland by the latter through one John G. Kribs, in whose possession they were placed under circumstances mentioned hereafter; and there was a cross-bill by Bartlett to declare the notes paid and the mortgage satisfied. McClelland purchased the notes of John S. Wilcox through Kribs and paid him therefor \$1,600, which was immediately paid by Kribs to John S. Wilcox. At the time they were thus sold and delivered to McClelland, which was Oct. 9th, 1873, there was on each note a blank assignment as follows: "Ed. S. Wilcox," over which name John S. Wilcox had, prior to placing them in the hands of Kribs, written the words "without recourse." On the 21st of October, 1870, Edward S. Wilcox and wife conveyed a tract of land in the city of Elgin to Bartlett & Bartlett, on the same day, among others, gave Wilcox a note for \$800, payable in two years from date, and one for a like amount payable in three years from date, with a mortgage on the purchased land to secure the notes.

October 21st, 1871, Edward S. Wilcox sold the notes with the mortgage security to his brother, John S. Wilcox, and made the above assignment in blank on the notes. As is sometimes done, as a matter of convenience in discharging a mortgage on record without recording a written assignment and having the discharge made by the assignee, Edward S. Wilcox gave his brother a blank release, probably undated, to be used when the notes should be fully paid up.

In November, 1871, Bartlett then being the owner, subdivided the tract of land into forty city lots, and after the recording the mortgage, conveyed all the lots to different purchasers, who are made defendants.

There would seem to be some inaccuracies in the allegations in the bill, as to these conveyances, or in the record as to the evidence. At any rate, the allegations and proof do not agree. Lot 36 is alleged to be in a deed from Bartlett to Sheffer, but it is not in the abstract of the deed. Lots 10, 12, 14 and 16 appear by the evidence to have been conveyed by Bartlett to

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Kribs, but there is no allegation in the bill that they were. Lots 18 and 20 appear by the evidence to have been conveyed to B. P. Mason, but there is no allegation that they were. It is alleged that Bartlett conveyed them to Kribs, and this is proved; Bartlett, according to the evidence, having conveyed them to Mason, and also afterwards to Kribs, the deed to Kribs being, however, first recorded.

The allegation in one place in the bill as to the releases of Edward S. Wilcox having been recorded prior to October 9th, 1873, does not seem to be accurate, and conflicts with an allegation on the subject in another part of the bill. Lot 16 is probably accidentally omitted from those mentioned in the bill as released. These and other inaccuracies should be corrected by amendment of the bill before another hearing.

While Bartlett was still the owner of many of the lots, an arrangement was made between him and James Coleman and John G. Kribs which it is difficult to understand fully. The three were each in some way interested in the division of the proceeds to be derived from the sales of the lots, either as owners, or in being paid for services rendered in effecting sales. The only evidence as to what the relations of Bartlett, Coleman and Kribs were, is that of the two former; and they have evidently omitted to state the whole facts fully. The latter was not examined as a witness. Bartlett, who had given some kind of a contract to Coleman, says he had an interest in the property of \$800, besides paying incumbrance, which Coleman agreed to do, and that he got this \$800 out of the proceeds—part in money and part in notes. Coleman was evidently pecuniarily embarrassed, and it was not convenient for him to have the title in his name; consequently when sales were made, Bartlett made deeds. Bartlett also, on Oct. 10th, and November 1st, 1873, conveyed to Kribs a portion of the lots, and Kribs afterwards executed deeds to various parties.

If Bartlett's statement be true, that his interest was only as above stated, then Coleman and Kribs were to divide proceeds of sales over Bartlett's \$800 in equal or unequal proportions, or Coleman was to have all the proceeds, and Kribs was to be paid for his services as confidential title holder and lot seller for Coleman.

Coleman says that he was to pay the Wilcox notes and interest, and Kribs \$50, which Kribs charged Bartlett, and that he had the balance of the lots conveyed to Kribs, to be held for him. How matters stood between Coleman and Kribs does not appear; consequently if Coleman and Kribs—if they were jointly interested in the lots, or Kribs alone if not—could manage not to pay the Wilcox notes, they, or one of them, would be that much better off. In this condition of things, and while Bartlett still held the legal title in his name, and Coleman held a contract of some kind from Bartlett, an auction or public sale of the lots was advertised, and the unsold lots, except perhaps those afterwards deeded by Bartlett to Kribs to hold for Coleman, were sold at auction on the terms one-third cash, balance in one and two years with mortgage; and Bartlett made deeds to the several purchasers, and these deeds bear date Oct. 10th, 1873; but the payment of the paid portions of purchase money and the giving the mortgage afterwards for the unpaid part, were probably, and according to Bartlett's answer, about the 20th of that month. When sales were made, lots were from time to time inserted in the blank release; and in one instance Edward S. Wilcox furnished another release containing some lots which Kribs passed over to a purchaser. It would also seem to have been the understanding of J. S. Wilcox, the then holder of the two \$800 notes, and perhaps of Bartlett, Coleman and Kribs—though it is not certain that the last three ever intended to do so—that Kribs should pay the two \$800 notes out of the proceeds of the sales of the lots. J. S. Wilcox, who seems not to have had confidence in Coleman, after writing "without recourse" as stated, placed the two \$800 notes in Kribs' hands, and Kribs was ostensibly constituted by Bartlett and Coleman, or perhaps more particularly by the latter, an agent to collect the proceeds of the sales and apply part thereof to the payment of the two \$800 notes thus left with him by Wilcox, who also left with him the before mentioned, probably undated release signed by Edward S. Wilcox. Coleman does not swear, however, that Kribs in his accounts with him deducted out of proceeds of sales of lots any amount as paid to Wilcox on the two \$800 notes. Of course, if Bartlett received the

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\$800 belonging to him out of the proceeds of sale as before stated, there was no deducting as to him of money paid by Kribs to Wilcox, and he may possibly not have known how it was, or he may have known all about it. All that was done and known by the three is probably not disclosed.

The complainant and Kribs had been acquaintances. They used to be neighbors when Kribs was a boy, and Kribs had discovered that the old gentleman had lately sold his farm, and that he was in funds. It was a good financial operation for him and Coleman to get along without applying the proceeds of the sales of the lots to the payment of the two \$800 notes. Consequently Kribs, having in his possession the \$800 notes, which Coleman ought to pay, and which he says it was his duty to pay, instead of applying the proceeds of the sales for that purpose, on the 9th day of October, A. D. 1873, sold the notes to complainant for \$1,600, the interest having been paid, and passed them over to him already indorsed in blank and "without recourse," as aforesaid, and actually paid John S. Wilcox the \$1,600 thus received in the very checks he obtained. Wilcox perhaps did not know, and probably did not care, whether he occupied the position of a seller of the notes without recourse, or that of one whose notes had been paid. To us, however, it appears very clear that McClelland, on the 9th day of October, A. D. 1873, became the purchaser of the two notes and of the mortgage as incident thereto, and that no money paid to Kribs by Coleman, after J. S. Wilcox had ceased to be the holder of the notes, was a good payment as against one to whom they had been transferred, and who was the holder for value. If a man desire to be safe in paying negotiable paper to a payee or assignee, before or after maturity, he must see to it that he pays to a holder of the note, and not to one who has been, but is not when he pays. *Holmes v. Field*, 12 Ill. 424; *Story on Promissory Notes*, § 375. If Kribs had the notes with authority to sell them, and we think he had, payment to him after he had sold them will not satisfy them, though the one paying supposed he still held them. He should have asked to see the notes before he paid them, and should have taken them up when paid. All the payments made by Coleman to

Kribs, if made by retaining proceeds of sales by the latter, were after Wilcox had ceased to be the owner and holder of the notes, and after, through Kribs, he had sold and delivered them to complainant for a valuable consideration regularly indorsed. It does not, however, even appear that Kribs did retain the \$1,600 from Coleman's money in his hands. On the contrary, it looks very much as though the amount retained, if any, was not for the sole pecuniary advantage of Kribs; that he did not really embezzle the \$1,600, but that Coleman, who had contracted with Bartlett that he would do so, has omitted, or that Coleman and Kribs, if jointly interested, have omitted to use the proceeds of sales for that purpose, and that in a mere pecuniary view of the subject, it is a matter of no moment to them whether complainant or Bartlett's grantees should bear the loss.

The complainant certainly has more of the appearance of a victim than any one else in this record. We can look upon him in no other light than as the assignee and holder of the unpaid two \$800 notes and the mortgage, and that he is entitled to foreclose the same and make the amount thereof out of the mortgaged premises, or some portion thereof, and that therefore, by the decree dismissing his bill, and by granting the relief prayed for in Bartlett's cross-bill, thus destroying his mortgage and also declaring his two notes paid, so that he has no redress either in equity to foreclose and sell, or at common law by suit against maker or prior endorsers, there was error.

It is apparent that the bias and leaning of Bartlett, Coleman & Kribs, perhaps because not financially prosperous, were very strong in favor of owing debts rather than of paying them, and that for this reason among others, it seems to us that the mortgage debt was never paid to John S. Wilcox, or to Kribs for him, out of the proceeds of the sales of the lots, but solely to Wilcox out of the proceeds of the sale of the two notes. Even, however, if Coleman did pay the notes to Kribs for Wilcox, they were paid to one who had no right to receive payment after the notes were transferred for value, and while McClelland, the complainant, was the legal owner and holder. If it were true that Kribs, after paying the \$1,600 received of complainant

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to Wilcox, had embezzled \$1,600 of Coleman's money in his hands, or of money belonging to Bartlett and Coleman, or Coleman and Bartlett's share, if the money belonged to all three, Bartlett and Coleman or one of them certainly would have said so distinctly on his examination as a witness.

For the reasons stated we think the decree should be reversed and the cause remanded, and that the questions as to which of the lots should be first liable should be left in less confusion and uncertainty, by more accuracy of allegation and proofs, and that to that end complainant have leave to amend his bill. We think the lots to which the title still remains in Kribs, if any, should be first sold and the proceeds applied, and next, the other lots unreleased at the time complainant purchased the notes, should be applied to the satisfaction of the mortgage debt.

Reversed and remanded.

THE MICHIGAN STATE INSURANCE COMPANY

V.

STEPHEN ABENS.

1. PROCESS—SERVICE UPON CORPORATION.—Service of a summons upon a foreign insurance company which states that the president of the company was not found in the city of Aurora, but fails to state that he was not found in the county where suit was brought, is insufficient; it is not a compliance with the statute.

2. SERVICE UPON AGENT—WHEN COMPANY HAS CEASED DOING BUSINESS IN THE STATE.—The act relating to foreign insurance companies provides that when such company ceases to transact business in this State, the agents last designated, or acting as such, shall be deemed to continue for the purpose of serving process, etc.; in such a case service must be made upon such last designated agents of the company, and the sheriff takes upon himself the responsibility of determining whether service is actually made upon an officer of the company.

3. WHO IS MEANT BY LAST DESIGNATED AGENT.—The statute evidently refers to the agents last acting in the entire State, and not to such as may have been dispensed within any particular county where the plaintiff happens to reside, provided others remain in the jurisdiction upon which service can be made.

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ERROR to the City Court of Aurora; the Hon. FRANK M. ANNIS, Judge, presiding. Opinion filed May 2, 1879.

MR. CHARLES WHEATON, for plaintiff in error; that if process has not been properly served, the court has no authority, and all its proceedings are void, cited Goudy v. Hall, 30 Ill. 109; Johnson v. Johnson, 30 Ill. 215; Campbell v. McCahan, 41 Ill. 45; G. T. M. M. & T. Co. Schiemer, 64 Ill. 106.

Where service is insufficient and no appearance, the judgment must be reversed; St. L. A. & T. H. R. R. Co. v. Dorsey, 47 Ill. 288.

It must appear affirmatively from the officer's return that there was legal service: Varian v. Edmonson, 5 Gilm. 270; Belingal v. Gear, 3 Scam. 575; Cost v. Rose, 17 Ill. 276; Boyland v. Boyland, 18 Ill. 551.

The return must be positive as to service on the proper officer of a corporation: Ill. & Miss. Tel. Co. v. Kennedy, 24 Ill. 319.

Nothing will be presumed in favor of the jurisdiction of an inferior court: Shufeldt v. Buckley, 45 Ill. 223.

City courts cannot send their process beyond the city limits: People v. Evans, 18 Ill. 361; Holmes v. Fihlenburg, 54 Ill. 203; Dixon v. Dixon, 61 Ill. 324.

It must appear from the return that service was had in the city: Gardner v. Witbord, 59 Ill. 145.

A party may contest the fact of such service: Owens v. Ranstead, 22 Ill. 161; Brown v. Brown, 59 Ill. 315; Hickey v. Stone, 60 Ill. 458; Wilday v. McConnell, 63 Ill. 278.

The Circuit Court alone has jurisdiction of such actions: Board of Supervisors v. Young, 31 Ill. 194; Randolph County v. Ralls, 18 Ill. 29.

Want of proper service may be raised by motion: Protection Life Ins Co. v. Palmer, 81 Ill. 90.

MR. B. F. PARKS, for defendant in error; as to service upon corporations, cited Rev. Stat. 1874, 598.

Upon the question of jurisdiction of the city court: Rev. Stat. 1874, 345, § 191.

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SIBLEY, J. An action of assumpsit was commenced in the City Court of Aurora, by Stephen Abens against the appellant, upon a policy of insurance issued by it to indemnify him in case of loss from fire. At the June term of that court a judgment by default was entered against the company. Afterwards during the term, a motion was made to set aside the default on account of an insufficient service upon the defendant in the suit, which reads as follows:

"Served this on the within named, the Michigan State Insurance Co. of the city of Adrian, Michigan, by reading and by delivering a copy to C. H. White and David Iliff, as agents for said company, the president of said company not found in the city of Aurora, Kane county, Illinois, this 10th day of May, 1876.

"CHAS. S. MIXER, Sheriff,

"By I. W. Rice, Deputy."

And for leave to plead. Affidavits were filed in support of the motion, from which it appeared that White and Iliff had ceased to be agents of the company for a considerable period previous to the service on them.

The court refused to open the default and allow the company to plead to the action. From that decision an appeal was taken, and this is the only question presented for our consideration.

A service very similar was held in *The Illinois and Mississippi Telegraph Co. v. Kennedy*, 24 Ill. 319, to be insufficient. It was there said that the return must be positive and the sheriff takes upon himself the responsibility of determining the fact whether the service was actually made upon an officer of the corporation. The service here is defective not only in this respect, but it is also open to another objection. It states that the president of the company was not found in the city of Aurora. What is the inference to be drawn from that statement? Simply that he might have been found outside of the city, in the county of Kane, if search had been made. This is not a compliance with the statute, which authorizes a service upon an agent only in case the president cannot be found in the county where the suit is brought.

Counsel for appellee make one point which will be noticed. The other reasons urged, especially those outside the record,

cannot be expected to have any influence upon the decision of the case in this court.

Sec. 22 of Ch. 73, of the revised laws of 1874, in relation to fire insurance companies, reads that "in case any insurance company not incorporated in this State, shall cease to transact business in this State according to the laws thereof, the agents last designated or acting as such for such corporation, shall be deemed to continue agents for such corporation, for the purpose of serving process for commencing action upon any policy or liability issued or contracted while such corporation transacted business in this State; and service of such process for the cause aforesaid upon such agents shall be deemed a valid personal service upon such corporation."

When a foreign insurance company has ceased to transact business in this State, the agents last designated are deemed to continue in office, for the purpose of serving process upon the corporation.

This in no respect changes the rule stated in *The Illinois and Miss. Telegraph Co. v. Kennedy*, *supra*. It is wholly immaterial whether the agent is created by the corporation or continued in office by force of the statute. The service should be the same, and the officer making it in either case must take upon himself the obligation of stating the fact of agency in positive terms.

Although the company may have, as is insisted, withdrawn its business from the State, still, to render the service a valid one under the statute on a person not at the time an officer of the corporation, it must be made upon its agents last designated or acting as such. How is the proof upon that subject in the present case? Not that White or Iliff were the last designated or acting agents of the company, or even amongst the last in this State, but that one R. S. Critchell, residing in Chicago, had been continued after White and Iliff were discharged, and was at the time of this service acting as agent of the company. The statute evidently refers to the agents last acting in the entire State, and not to such as may have been dispensed with in any particular county where the plaintiff happens to reside, provided others remain in the jurisdiction

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upon which service can be made. This it was doubtless seen would afford an ample remedy in such cases, as by the practice act the Circuit Court was empowered to send its process to any county in the State where the last acting agent might be found.

The City Court erred in not setting aside the default, and allowing the defendant to plead. The judgment is therefore reversed and the cause remanded, with leave to the appellant to plead to the merits of the action.

Reversed and remanded.

JANE COOPER

v.

WILLIAM COOPER.

1. **MINOR—SERVICE AFTER MAJORITY.**—If a child remains with a parent after arriving at majority, in the same apparent situation as when a minor, in the absence of a contract, no recovery can be had for services rendered by him.

2. **RESULTING TRUST.**—The court, reviewing the evidence, finds that it comes far short of establishing a resulting trust, as claimed by the complainant.

3. **SPECIFIC PERFORMANCE OF PAROL CONTRACT.**—Before a court will decree a specific performance of a parol contract, the proof to sustain it must be clear and unequivocal. In this case the allegations of the complainant upon this point are unsupported by the testimony.

ERROR to the Circuit Court of LaSalle county; the Hon. EDWIN S. LELAND, Judge, presiding. Opinion filed May 2, 1879.

Mr. WALTER REEVES and Mr. E. F. BULL, for plaintiff in error; that courts will be cautious in enforcing specific performance of a contract where there is doubt as to its existence or terms, cited *Rector v. Rector*, 3 Gilm. 105; *Alexander v. Hoffman*, 70 Ill. 114; *Gosse v. Jones*, 73 Ill. 508; *Kimball v. Tooke*, 70 Ill. 553.

The proofs do not conform to the allegations of the bill, and

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this is fatal to a recovery: Cronk v. Trumble, 66 Ill. 428; Hartwell v. Black, 48 Ill. 301; Taylor v. Merrill, 55 Ill. 52.

The finding of the court is at variance with the allegations of the bill: Tiernan v. Granger, 65 Ill. 351; Gosse v. Jones, 73 Ill. 508.

A clear preponderance of evidence must be had before a specific performance will be decreed: Fleischman v. Moore, 79 Ill. 539; Carver v. Lasater, 36 Ill. 182; Brink v. Steadman, 70 Ill. 241; Lantry v. Lantry, 51 Ill. 458; Wilmer v. Farris, 40 Iowa, 309.

Upon the question of a minor's right to pay for services after majority: Freeman v. Freeman, 65 Ill. 106; Miller v. Miller, 16 Ill. 296.

Mr. D. P. Jones, for defendant in error; that a parol promise by a father to son to deed land to him, where the son enters into possession and makes improvements on the faith of such promise, will be enforced: Bright v. Bright, 41 Ill. 97.

The earnings of a child during minority, after he has been emancipated, are his own: Partridge v. Arnold, 73 Ill. 600; Scott v. White, 71 Ill. 287; Holmes v. Holmes, 44 Ill. 168.

SIBLEY, J. The bill in this case was filed in 1876, and from that it is made to appear that Jane Cooper, the plaintiff in error, resided with her husband in New Hampshire until his death, which took place about 1855. Soon after that occurrence, she, with her eight children, removed to and settled in the county of LaSalle, in this State, where she purchased a small farm of eighty acres, using for that purpose some moneys which she had received from her husband's estate. William, the complainant in this suit, was then a lad of some eleven years old. He, soon after the arrival of the family, went to work for a neighbor, and his mother collected his wages for nearly three years. On returning home, he remained until 1862, when he entered the army of the United States. He continued in the military service about three years. During that period he sent home to his mother various sums of money, which it is alleged she loaned out for his benefit. After returning from the army in

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1865, he resided with his mother, and worked for her nearly two years, and his services during that time were worth \$293 for which he had never received any payment.

The bill further states, that in the latter part of the year 1865, an agreement was entered into between him and his brothers, John and Edward, to purchase of one Cushman, for their common benefit, two hundred and forty acres of land, situated in LaSalle county, each to pay a portion of the purchase money.

Under this arrangement the land was bought for \$4,412.20, in the name of their mother, Jane, but for the use of the complainant and his two brothers, John and Edward. The money which the complainant earned while in the army and sent to his mother, was used in part payment of the purchase price for the land, and the remainder was afterwards paid to Cushman by his brothers, John and Edward, though the deed was executed to Jane Cooper without the knowledge of the complainant, and she paid no part of the consideration money. Afterward, in July, 1867, it was mutually agreed between the complainant, his mother and brothers, John and Edward, that a division or partition should be made of the land purchased from Cushman, in the following manner:

The west eighty acres was allotted to John; the east eighty to Edward; and the middle eighty to the complainant. It was further agreed by the parties, that Jane Cooper should execute a deed to the complainant for his eighty acres thus set off to him, and that he was to pay her the sum of five hundred dollars as soon as he could. In the early part of 1868, complainant, with the consent of the other defendants, took possession of the portion allotted to him, and made valuable improvements upon it, which possession has been continued to the present time. The complainant alleges that he has tendered to his mother the \$500, and she refused to make him a deed for the eighty acres, as agreed upon by the parties in interest.

A default was taken as to defendants, John and Edward Cooper, but Mrs. Jane Cooper answered, denying all the material allegations in the bill. Upon the proofs coming in with the master's report, the court decreed the relief sought, and Jane

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Cooper has brought the case to this court on error, seeking a reversal of that decree. The defendant in error, to sustain the decree, bases his argument chiefly upon two grounds, which are the only ones of importance enough to justify any attention. First. That the money of these three sons was used in purchasing the land, and therefore a resulting trust was created in their favor. Second. Mrs. Cooper agreed with the complainant to convey to him the eighty acres claimed in the bill, and he entered into the possession of it under the contract, and made valuable improvements, which entitled him to a specific performance of the agreement. The proof to sustain the first position, consists mainly in the testimony of the complainant. He, upon his second examination testifies that a part of the money furnished to purchase the land belonged to him, a part to his brothers, and a part he supposed belonged to his mother. The portion that he furnished was estimated at \$800. How he makes up that amount is not explained. It is true, he says that he sent home from the army some \$700, and that his mother collected his wages earned before entering the service. Still he does not seem to know whether this money or any considerable portion of it was used in the purchase of these lands, and it must be borne in mind, that he was an infant under the age of twenty-one years, until long after he entered the army. During that period his mother was entitled to his earnings, and may for anything that appears, have appropriated them to the support of herself and family. Such is not only the law, but it was held in *Miller v. Miller*, 16 Ill. 296, *Morton, Adm'r v. Rainey*, 82 Ill. 215, and many other cases, "that if a child remained with a parent after majority in the same apparent situation as when a minor, in the absence of a contract, no recovery can be had for services rendered." This disposes of the question relative to the services claimed by the complainant to have been rendered by him for his mother after his return from the war, while a member of her family. Since there is no pretense that she agreed to pay him wages, or that he was employed under such circumstances as a promise could be implied.

Counsel assert that a child after he has been emancipated by his parents, is entitled to his own earnings. This proposition is

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not disputed. But as the record here is silent upon that subject, it must be presumed that the natural relation of mother and son continued to exist during his minority, and even afterward as long as he remained a member of her family.

All the material allegations of the complainant upon which he founds his claim for relief, are positively denied by his brothers, John and Edward Cooper. They both swear that William did not send home to his mother more than about \$400; and that Jane Cooper purchased these lands of Cushman, and paid for them out of her own means. Mrs. Cooper also testified to the same effect, and that she never received from the complainant more than \$100 after he became of age. If this statement was not true, how easy it would have been for him to contradict it. On the contrary, he does not mention his age when he entered the army, or when he returned home.

The whole testimony, when taken together, comes far short of clearly establishing a resulting trust in favor of the complainant for the eighty acres claimed in the bill. In examining the testimony, the admission of Jane Cooper in respect to the fact that the land was purchased for her sons, and that she had loaned money, calling it Williams', which was very natural for her to do, notwithstanding she was really entitled to his earnings (except the bounty reward as a soldier), if she chose to claim them, have not been overlooked.

Second. Was the testimony sufficient to justify the court in decreeing a specific performance of the parol agreement stated in the bill? The contract is alleged to have been made July, 1867, mutually between the complainant and the defendants, Jane, John and Edward Cooper, by which the premises purchased of Cushman were to be divided so that John was to get the west eighty acres, Edward the east eighty, and the complainant the middle eighty. Jane was to convey to the complainant his eighty acres, and he to pay her for the conveyance \$500 as soon as he could procure the money.

Although the statute of frauds may not have been set up in the answer, and relied upon, which would, it is believed, have been fatal to the complainant's right of recovery, yet the

authorities are all to the effect that, before the court will decree a specific performance of a parol contract, the proof to sustain it must be clear and unequivocal. It is said that a parol promise by a father to his son, to convey land, if the son enters into possession under the agreement, relying upon the faith of it, makes valuable improvements, equity will enforce the contract. And the case of *Bright et al. v. Bright*, 41 Ill. 100, is referred to as sustaining the position. But it should be recollected there is no evidence in this case that the complainant did enter into the possession of the premises, under the agreement stated, relying upon the faith of it, and made valuable improvements, which is one of the necessary requisites to enable the court to exercise its equitable powers. Indeed, the weight of evidence is that he never had possession of the whole eighty claimed by him.

From the complainant's testimony it would seem that he took possession under claim of ownership, by virtue of the purchase from Cushman. Mrs. Cooper's evidence is that he went into possession as her tenant, and never paid any rent, except two or three years' taxes, because he would not, and she did not turn him out for the reason he was her son. If he had been let into possession as a purchaser, that of itself would have been a sufficient answer to the claim for rent. But neither of them treat the possession as having been obtained by virtue of, and under any agreement on the part of Jane Cooper to convey the land to the complainant.

But leaving out the question of the statute of frauds, should the almost unsupported testimony of the complainant be allowed to prevail over that of his mother, corroborated by her two sons, John and Edward, with such convincing force as to remove any reasonable apprehension that might arise respecting its accuracy? We feel constrained to give a negative answer to the question. Therefore, the decree of the Circuit Court will be reversed, and the cause remanded.

Decree reversed.

LELAND, J., having decided this case in the court below, took no part in the decision of it here.

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MARIA E. YOUNG

v.

SAMUEL C. STEARNS ET AL.

1. DEED—DELIVERY.—While it is true that it is essential to the legal operation of a deed that the grantee assents to receive it, yet it is equally true that it can be delivered to a third party by sufficient authority from the grantee, and such delivery will be as effectual to pass the title as if made to the grantee himself.

CREDITOR'S BILL—EVIDENCE INSUFFICIENT TO SHOW FRAUD.—A bill was filed by defendants in error against plaintiff in error, impleaded with others, to set aside a conveyance of lands to her, as fraudulent. The preponderance of testimony showing that plaintiff in error received the conveyance in good faith, in satisfaction of a *bona fide* debt, and with no knowledge of other indebtedness of the grantor, and with no fraudulent intent, the court erred in setting aside such conveyance. The delay of the debtor in putting the deed upon record cannot, under the circumstances, prejudice the rights of plaintiff in error.

ERROR to the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

Mr. G. D. A. PARKS, for plaintiff in error; that delivery of a deed to a third party in pursuance of a previous agreement, is a good delivery, cited *Cooper v. Jackson*, 4 Wis. 548; *Herbert v. Herbert*, Breese, 354; *Hulick v. Scoville*, 4 Gilm. 159; *Wiggins v. Lusk*, 12 Ill. 132; *Himes v. Keighlingher*, 14 Ill. 469; *Kingsbury v. Burnside*, 58 Ill. 310; *Crocker v. Lowenthal*, 83 Ill. 582; 3 Washburn on Real Property, 255.

Both vendor and vendee must participate in the fraudulent intention: *Hatch v. Jordon*, 74 Ill. 414; *Myers v. Kinzie*, 26 Ill. 36; *Gridley v. Bingham*, 51 Ill. 153; *Ewing v. Runkle*, 20 Ill. 448.

A debtor may prefer one creditor to another: *Hessing v. McCloskey*, 37 Ill. 341; *Bump on Fraudulent Conveyances*, 178.

Mr. GEORGE S. HOUSE, for defendants in error.

PILLSBURY, P. J. Creditor's bill filed in Will Circuit Court

by defendants in error against plaintiff in error, and one Bush, alleging in substance that a judgment was rendered in said court in favor of defendant in error, Knox, and against Hiram F. Bush, for the sum of \$592.90, on the 7th day of October, A. D. 1871; that execution was issued thereon and returned "no property found;" and that the indebtedness upon which said judgment was based, accrued long prior thereto. That on the 2nd day of October, 1871, said Bush filed in the recorder's office of said county, a deed to Maria E. Young for certain lots in the city of Joliet, and charges that said deed was made without any sufficient consideration, and with design to delay and defraud the complainants and other creditors; and that said deed was never delivered to the grantee, and that the judgment, so recovered by Knox, was for the use and benefit of the other defendants in error, Stearns, Leach and Jones.

The bill also alleges the recovery of two other judgments against Bush, but as the case was disposed of in the court below as to them, and they not being before us upon this record, nothing need be said further as to them.

The answer of Mrs. Young sets up that long before the rendition of the judgments in question, to wit: On the 12th day of November, 1869, she purchased the premises in good faith from Bush; that the purpose of both parties at that time was to perfect the conveyance to her without delay; that her husband, D. C. Young, who had acted as her agent, having left Joliet for California within a day or two after the deed had been prepared, and she having no agent to assist her in her business but Bush himself, who was her son-in-law, the execution of the deed, as promised, was neglected; that it was not acknowledged until January, 1871, nor filed for record till 2nd October, 1871; that such delay was in consequence of no fraudulent arrangement with her, but entirely from the negligence and procrastination of said Bush during her absence in California, where she resided; that on the 12th day of November, 1869, Bush was justly indebted to her in the sum of over \$2,000, exclusive of interest, on a settlement of accounts made before her husband's departure for California; that such indebtedness consisted of divers sums of money loaned to Bush

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or paid for his use, or received by him for her use; that the conveyance was to be an absolute deed, but there was an understanding that she would re-convey upon re-payment; that she knew nothing of Bush's other debts or pecuniary embarrassments.

Upon the hearing, a decree was rendered, subjecting the premises to sale under the judgment, and setting aside the deed to plaintiff in error, and she appeals.

Daniel C. Young, husband of plaintiff in error, testified that in November, 1869, Bush was indebted to Mrs. Young over \$2,000, and gives the items constituting such indebtedness, and the dates when received by Bush, or paid out for him at his request.

This witness further states that he transacted all this business on behalf of his wife, and that he left Joliet for California in November, 1869; and previous to leaving he entered into an agreement with Bush to deed the premises to Mrs. Young, in consideration of this indebtedness; that in pursuance of such agreement, he filled out the deed referred to in the original bill, and went with Mr. Bush to find a notary public to have it acknowledged; but by reason of the absence of the notary, it was deferred; and on the day before he left, Mr. Bush promised to have the deed executed without delay, and place it upon the record; and neither he or his wife was informed that it had not been done until the latter part of October, 1871.

Bush swears that on the 12th of November, 1869, at date of deed, he was owing Mrs. Young over \$2,000 for money loaned, corroborating the witness Young as to items and dates; that the deed was drafted by the witness, D. C. Young; that he promised him, the day before he left, to have the deed executed, acknowledged, and left for record immediately. He further says, that the date of acknowledgment, Jan. 3, 1871, is correct, and that he delayed, thinking there was no hurry, and that it might injure his credit; but such delay was not by any arrangement with Mrs. Young; that the deed was made as an absolute conveyance, but with the understanding that she would re-convey on payment of the indebtedness; that he did not pay it, and filed the deed for record for her.

This is all the testimony in the record bearing directly upon the consideration of the deed, or the circumstances under which it was delivered. The evidence of the complainants consists of admissions by Bush that he owned the property, and the further statements of complainants that they trusted him upon the strength of his being in the possession of the premises, as the owner thereof. We deem this evidence entirely insufficient to overcome the positive testimony of Young and Bush. We have no reasonable doubt that Bush was indebted to Mrs. Young at the date of the deed, in an amount fully equaling the consideration named therein. It is quite clear from the proof, also, that she was no party to the delay in having the same recorded.

Of course the deed did not operate as a conveyance until its delivery to her, or to some one for her, with her approval.

The debtor would have had the undoubted right to prefer Mrs. Young to his other creditors; and had he, on the date of the recording the deed, conveyed to her the lots in satisfaction of his indebtedness to her, these complainants could not have complained, and it appears to us she is in no worse position because she made this agreement with Bush to execute the deed and deliver it to the recorder for her, long prior to the time he became indebted to complainants. Had Bush done as he had agreed, the deed would have been delivered to the recorder in November, 1869; but as he did it before the complainants obtained a lien upon the property, we are of the opinion that the laches of Bush cannot defeat her claim to the property through the deed, if it is otherwise valid.

The only other point is, whether under the circumstances proven, the delivery to the recorder was a delivery to her so as to make the deed operative.

The proof is that Bush was to execute the deed, and deliver it to the recorder to be recorded for her.

While it is true that it is essential to the legal operation of a deed that the grantee assents to receive it, and that the same cannot be imposed upon him, yet it is equally true that it can be delivered to a third party by sufficient authority from the grantee, and such delivery will be as effectual as if made to the

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party himself—the underlying principle being the assent of the grantee to such delivery for his use, and this assent can be shown by the acts of the parties as well as by words. There can be no question in this case but that the deed was delivered to the recorder for her use, and with not only her assent, but a positive agreement that it should be so delivered; and this, we believe, constitutes a valid delivery under all the authorities.

Under the proof as it appears in this record, the court below should have dismissed the bill. The decree of the court below will be reversed and cause remanded.

Decree reversed.

ELMER BOHANAN ET AL.

V.

MAJOR S. BOHANAN.

MISTAKE IN A DEED—POWER OF COURT TO CORRECT.—B., to induce his son to relinquish a contemplated removal to Nebraska, told him if he would remain he would purchase for him a forty-acre tract, which he accordingly did, and the son made improvements upon the house and farm, and put in crops, but without actually moving upon the premises. By mistake, as claimed by complainants, B. was named as grantee in the deed instead of his son. The son died shortly after, and on a bill filed by his heirs to correct mistake in the deed, *held*, that the evidence tending strongly to show the intention of the parties that the land should be conveyed to the son in fee, a court of equity would correct the mistake and order a conveyance of the fee to the heirs of the son.

ERROR to the Circuit Court of Peoria county; the Hon. J. W. COCHRAN, Judge, presiding. Opinion filed May 2, 1879.

Mr. J. K. COOPER and Mr. N. E. WORTHINGTON, for plaintiff in error; on the power and duty of a court of equity to correct a mistake, cited *Broadwell v. Broadwell*, 1 Gilm. 599; *Ruffner v. McConnell*, 17 Ill. 217; *Story's Eq. Jur.* § 161; *Kenselbrach v. Livingston*, 4 Johns. Ch. 145; *Hunt v. Rousmaniere*, 1 Pet. 13; *Rider v. Powell*, 4 Abb.; *Hunter v. Bilyeu*, 30 Ill. 368;

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Clearwater v. Kinler, 43 Ill. 272; Mills v. Lockwood, 42 Ill. 111; Briegel v. Moeller, 82 Ill. 257; Moore v. Munn, 69 Ill. 591; McLennan v. Johnson, 60 Ill. 306; Long v. Hartwell, 34 N. J. 116; Goltra v. Sanasack, 53 Ill. 456; West v. Madison Agr'l Board, 82 Ill. 205; Hunt v. Frazier, 6 Jones' Eq. 90; Clayton v. Freet, 100 Ohio, 544; Ex. Bank v. Russell, 50 No. 531; Wheeler v. Kirtland, 23 N. J. Eq. 13.

Part performance will take the case out of the Statute of Frauds: Hawkins v. Hunt, 14 Ill. 42; Ramsay v. Liston, 25 Ill. 114; Deniston v. Hoagland, 67 Ill. 265; Adkinson v. Tanner, 68 Ill. 247; Parkhurst v. Van Courtland, 14 Johns. 15; Freeman v. Freeman, 43 N. Y. 34; Annam v. Merritt, 13 Conn. 479; Farrar v. Patton, 20 Mo. 81; Peckham v. Berkham, 8 R. I. 17; Wood v. Thornley, 58 Ill. 464.

Delivery of or entry into possession with consent of the vendor, in pursuance of the contract, will entitle the vendee to specific performance: 1 Leading Cas. in Eq. 1045; Eaton v. Whitaker, 18 Conn. 222; Tilton v. Tilton, 9 N. H. 386; Allen's Est. 1 Watts & Serg. 383; Pugh v. Good, 1 Watts & Serg. 56; Johnson v. Glancy, 4 Blackf. 94; Haugemont v. Pomeroy, 7 C. E. Green, 119.

So if a child enters into possession and makes improvements under a parol promise from the father to convey: Kurtz v. Hibner, 55 Ill. 514.

Making valuable improvements is a good consideration for the promise: Bright v. Bright, 41 Ill. 97; Lessee of Tyler v. Eckhart, 1 Binn. 378; Ford v. Ellingwood, 3 Met. (Ky.) 359; King's Heirs v. Thompson, 9 Pet. 204; Young v. Glendenning, 6 Watts, 509; Wood v. Thornley, 58 Ill. 464.

A parol gift followed by acts or expenditures by the donee which render a revocation of the gift unjust or inequitable, will be upheld and enforced: 1 Leading Cas. in Eq. 1047; Sace v. Henry, 39 Ind. 414; Galbreath v. Galbreath, 1 Kan. 402; Syler v. Eckardt, 5 Binn. 308; Young v. Glendenning, 6 Watts, 309; Mahon v. Baker, 2 Casey, 519; Atkinson v. Jackson, 8 Ind. 30; Renker v. Abell, 8 B. Mon. 566.

A contract not obligatory when made, may be enforced at the suit of one who has changed his position for the worse on

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account of the offer: *Lansing v. Cole*, 3 Green Ch. 228; *France v. France*, 4 Halst. 650; *Young v. Paul*, 2 Stockt. ch. 402; *Vesey v. Sevy*, 13 How, 345; *Adams' Eq.* 86; *Old Colony R. R. Co. v. Evans*, 6 Gray, 26.

Promise to deed if grantee will improve, when condition is complied with, will compel specific performance: *Perkins v. Hadsell*, 50 Ill. 216.

Time is not of the essence of the contract, unless expressly so stipulated: *Snyder v. Spaulding*, 57 Ill. 480; *Dasel v. Jordan*, 104 Mass. 407; 2 Lead. Cas. in Eq. 1112.

A recovery may be had notwithstanding a failure to comply within the time fixed, unless it was intended to act as a condition precedent and avoid the contract if not fulfilled: *Martin v. Lamb*, 7 T. Rep. 5; *Roach v. Dickinson*, 9 Gratt. 156; 2 Smith's Lead. Cas. 23.

Mr. GEORGE PUTERBAUGH, for defendant in error; that the allegations and proof must correspond, cited *Taylor v. Merrill*, 55 Ill. 52; *Crank v. Trumble*, 66 Ill. 428.

A resulting trust is not founded on a contract: *Stephenson v. Thompson*, 13 Ill. 186; *Holmes v. Holmes*, 44 Ill. 168; *Williams v. Brown*, 14 Ill. 201; *Reeve v. Straw*, 14 Ill. 97; *Loomis v. Loomis*, 28 Ill. 454; 4 Kent Com. 305; *Perry v. McHenry*, 13 Ill. 227; *Fleming v. McHale*, 47 Ill. 282; *Remington v. Campbell*, 60 Ill. 516; *Walter v. Klock*, 55 Ill. 362.

A resulting trust can only arise at the time of the conveyance, and from the fact that money has been paid by one and conveyance made to another: *Alexander v. Tams*, 13 Ill. 221; *Rogers v. Murray*, 3 Paige, 398; *Perry v. McHenry*, 13 Ill. 227; *Greene v. Cook*, 29 Ill. 186; *Bruce v. Roney*, 18 Ill. 67; *Lear v. Choteau*, 23 Ill. 39; *Sheldon v. Harding*, 44 Ill. 68; *Lantry v. Lantry*, 51 Ill. 458.

Evidence to sustain a resulting trust must be clear and satisfactory: *Mahoney v. Mahoney*, 65 Ill. 406; *Wilson v. McDowell*, 78 Ill. 514.

Verbal understandings between the parties will not create a trust: *Allmon v. Pigg*, 82 Ill. 149; *Rogers v. Simmons*, 55 Ill. 76.

A voluntary agreement for the creation of a trust will not be binding so long as it remains executory: *Padfield v. Padfield*, 68 Ill. 210; Same case, 72 Ill. 326; *Perry on Torts*, § 98.

Relief from a mistake in fact will only be granted upon clear and satisfactory proof: *Ruffner v. McConnel*, 17 Ill. 217; *Hunter v. Bilyeu*, 30 Ill. 228; *Selby v. Geies*, 12 Ill. 69; *Broadwell v. Broadwell*, 1 Gilm. 599; *Miner v. Hess*, 47 Ill. 170; *Moore v. Munn*, 69 Ill. 591; *Mills v. Lockwood*, 42 Ill. 111.

Relief will not be granted from mistakes in the intention of only one of the parties: *Ruffner v. McConnel*, 17 Ill. 217; *Sutherland v. Sutherland*, 69 Ill. 481; *Wilson v. Byers*, 77 Ill. 76; *Emory v. Mohler*, 69 Ill. 221; *Frye on Specific Performance*, § 505.

To justify reformation of an instrument on the ground of mistake, the evidence must be clear and satisfactory: *Shay v. Pettes*, 35 Ill. 360; *McDonald v. Starkey*, 42 Ill. 442; *Palmer v. Converse*, 60 Ill. 313; *Cleary v. Babcock*, 41 Ill. 271; *Goltra v. Sanasack*, 53 Ill. 456; *Emory v. Mohler*, 69 Ill. 221; *Magnusson v. Johnson*, 73 Ill. 156; *Owen v. Blake*, 44 Ill. 135; *Price v. Karnes*, 59 Ill. 276; *Remington v. Campbell*, 60 Ill. 516.

Even had Bohanan done everything but formally deliver the deed, the *locus penitentiae* would remain, and a court would not enforce a delivery: *Hoig v. Adrian College*, 83 Ill. 267.

To enforce a verbal agreement to convey land, the proof must be clear and strong: *Bailey v. Edmunds*, 64 Ill. 125; *Allen v. Webb*, 64 Ill. 342; *Hartwell v. Black*, 48 Ill. 301; *Gosse v. Jones*, 73 Ill. 508.

A purchaser must have done everything on his part before he can ask a court to compel a conveyance: *Cronk v. Trumble*, 66 Ill. 428; *McCabe v. Crosier*, 69 Ill. 501; *Mix v. Baldue*, 78 Ill. 215; *Phelps v. Ill. Cent. R. R. Co.* 63 Ill. 468; *Kimball v. Tooke*, 70 Ill. 553; *Brink v. Steadman*, 70 Ill. 241; *Walker v. Douglas*, 70 Ill. 445.

Where conditions are not performed within five months after the time stipulated, without any excuse therefor, a specific performance will be precluded: *Mix v. Baldue*, 78 Ill. 215; *Hedenberg v. Jones*, 73 Ill. 149.

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Specific performance is in the discretion of the court, and will not be decreed as a matter of course: *Bowman v. Cunningham*, 78 Ill. 48; *McCabe v. Crosier*, 69 Ill. 501; *Fish v. Leser*, 69 Ill. 394; *Phelps v. Ill. Cent. R. R. Co.* 63 Ill. 468; *Lear v. Choteau*, 23 Ill. 39; *Alexander v. Hoffman*, 70 Ill. 114; *Ralls v. Ralls*, 82 Ill. 243; *Iglehart v. Vail*, 73 Ill. 63; *Gosse v. Jones*, 73 Ill. 508; *Proudfoot v. Wightman*, 78 Ill. 553; *Roby v. Cossitt*, 78 Ill. 638; *Taylor v. Merrill*, 55 Ill. 52; *Sutherland v. Parkins*, 75 Ill. 338.

Upon the question of a gift: *Cranz v. Kroger*, 22 Ill. 74; *Pope v. Dodson*, 58 Ill. 360; *Walton v. Walton*, 70 Ill. 142; *Wadhams v. Gay*, 73 Ill. 415; *Badgley v. Votrain*, 68 Ill. 25; *Hoig v. Adrian College*, 83 Ill. 267.

The parol agreement was within the Statute of Frauds: *Perry v. McHenry*, 13 Ill. 227; *Fleming v. Carter*, 70 Ill. 286; *Magnusson v. Johnson*, 73 Ill. 156; *Blount v. Tomlin*, 27 Ill. 93; *Urdike v. Armstrong*, 3 Scam. 564; *Stevens v. Wheeler*, 25 Ill. 300; *Thornton v. Heirs of Henry*, 2 Scam. 219; *Shirley v. Spencer*, 4 Gilm. 583; *Laird v. Allen*, 82 Ill. 43; *Mason v. Bair*, 33 Ill. 196; *Keys v. Test*, 33 Ill. 316.

Possession, to take the case out of the statute, must refer to the contract relied upon: *Story's Eq. Jur.* § 762; *Wood v. Thornley*, 58 Ill. 464; *Holmes v. Holmes*, 44 Ill. 168; *Peckham v. Berkham*, 8 R. I. 17.

Payment of the purchase money is not sufficient to take the case out of the statute: *Temple v. Johnson*, 71 Ill. 13; *Cronk v. Trumble*, 66 Ill. 428; *Story's Eq. Jur.* § 760.

Possession must be accompanied by improvements and expenditure in consequence of the promise: *Bright v. Bright*, 41 Ill. 97; *Kurtz v. Hibner*, 55 Ill. 514; *Wood v. Thornley*, 58 Ill. 464.

The agreement could not be performed within a year, and hence was within the Statute of Frauds: *Olt v. Lohnas*, 19 Ill. 576; *Wilson v. McDowell*, 78 Ill. 514; *Comstock v. Ward*, 22 Ill. 248; *Warner v. Hale*, 65 Ill. 395; *Curtis v. Sage*, 35 Ill. 22; *Wheeler v. Frankenthal*, 78 Ill. 124.

LELAND, J. The questions of fact in this case have been so thoroughly and exhaustively argued, that we could but repeat

what has been so well said if we were to give a detailed statement of all the circumstances tending to prove the conclusions of fact at which we have arrived.

Major S. Bohanan and his wife, and their son, James W. Bohanan, and his wife, were occupants of a dwelling house on the farm of the father, near Peoria. The farm was cultivated by the son, who was to account for one-half the proceeds as rent. For some reason, probably because the relations between the two females were so inharmonious as to render the joint occupancy unpleasant, James was disposed to seek relief from his supposed or real annoyances by emigrating to Nebraska. If he went, Hovenden, the father of his wife, promised to furnish him with a thousand dollars to start him in Nebraska. The father of James then agreed that if James would give up his contemplated removal and remain at home, he would purchase for him a forty-acre tract of land adjoining the home-farm and separated by the road only. So far all agree. There is, however, this difference between the parties to the suit: The father insists that James was to have only the remainder expectant upon the termination of a life estate in the father, and that James was to move on to the land, and during the life of the father account for one-half the products of the home-farm and of the forty. The complainants, who are the children of James, who was killed in October, 1872, insist that their father was to have the fee simple, and that he was not to pay any rent for the forty, but was to have what was raised on that as his own, though as to the home-farm, he was to account to his father for the one-half of the products. James gave up going West, and the forty-acre tract was purchased by his father for \$2,000. The owners of the tract thus purchased, which was in February, 1871, asked \$2,500 for the land, but finally agreed, if permitted to keep possession a year, to take \$2,000, and gave a bond for a deed, dated February 25th, 1871, the deed to be made March 1st, 1872, and a deed was made bearing date February 19th, 1872, though not acknowledged by some of the grantors, who were minors, until they became of age afterwards. The name of the father, Major S. Bohanan, was inserted as purchaser both in the bond and in the deed—the father says

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intentionally—the grandchildren, complainants, say by accident and mistake of the scrivener Emery, who wrote them.

The grandfather, though he admits that the writings should have been so made as to create a right to the rents during his own life, with the remainder expectant after the termination of his life, in his son, claims that the actual moving on to the forty by the son, was a condition precedent to the son having any interest conveyed to him. He concedes in his evidence that if the son had moved on to the forty in the spring of 1872, to use his own language, "I would then give him a writing it should be his at my death." The grantors or sellers of the land vacated and surrendered the possession in the spring of 1872, and James cultivated the land, and papered and painted, and made some other repairs on the house, and improvements on the land. He had, by the permission of the then owners, done some fall plowing in 1871, but no crop of small grain was put in, or if it were, it was plowed up the next spring, and the land planted with corn. And here is another controversy or circumstance affecting the merits of the controversy. There was some hay cut on the forty. The grandchildren claim that James had it all, and the grandfather claims that James kept half and gave him half. We think the weight of the evidence is that James was on the land, claiming all the crops—not the one-half only—and that he appropriated all the hay to his own use. Unfortunately, before the corn crop was gathered, James was injured by a threshing machine, and died in October.

After the death of his son, the father claimed half the corn. The relations between him and his son's widow being unfriendly, she went home to her father with her children, the complainants. The old gentleman kept half the corn, and the other half was administered upon as assets of the estate of the deceased son. The forty acre tract was not in the inventory. As the son at the time of his death had made arrangements to move into the house on the forty-acre tract, and would have done so in a short time if he had lived, and as he was in the actual possession of it, raising crops, repairing fences, fixing up the house, making gates, putting a pump in the well, as

his own, etc., we are not disposed to consider the mere fact that death arrested him in his course before he actually moved into the house, as any valid reason why complainants should be denied the relief asked for.

The only real point of difference then, is this: Complainants claim that their father was to have a full title to the land. The defendant, their grandfather, claims that he was to have the rents for life, and the son the remainder expectant, subject to such life use, or life estate.

A great many authorities are cited to show that a court of equity can, where the evidence is strong enough, correct mistakes in the description of land in deeds, and also in the names of grantees, but as this is so well known among lawyers and judges, we do not deem it necessary to cite them all. Where the mistake claimed is in the description, the grantor has usually a deep interest in the case. When it is, as in this case, as to who ought to have been named grantee, the grantor is usually a disinterested spectator of the controversy.

We think the evidence in this case is strong enough to show that the name intended to have been inserted in the bond and in the deed, was that of "James W." the son, and not "Major S." the father. The father has repeatedly so stated, and also that the land was his son's. On several occasions he has asked to have the correction made by erasing the "Major S." and inserting "James W." He requested the scrivener Emery to do so, who informed him that as the deed had been acknowledged, it would not be proper. Mrs. Standeven, one of the grantors, says that when she took the deed to him, he said it was wrong, and that he would go to Emery and have him change the name "Major S." to "James W." The evidence of the intention that the son should have the fee simple, and of the mistake in the deed is so clear and strong, that we have no doubt a case for the interposition of a court of equity to correct it, is made out. It is true that the land was a gift from the father to the son, but the son having given up going west, and taking with him the one thousand dollars from his wife's father, and also having taken possession of the given land, and expended money in improvements thereon as his own, though

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not to a large amount in value, makes the case one in which the mistake so clearly proved ought to be corrected in equity. We select a few of the many cases cited in the brief of plaintiffs in error. *West v. Madison Agricultural Board*, 82 Ill. 206; *Hunt v. Frazier*, 6 Jones, Eq. (N. C.) 90; *Clayton v. Frost*, 100 Ohio, N. S. 544; *Moore v. Munn*, 69 Ill. 591; *Ex. Bank v. Russell*, 50 Mo. 531; *Wheeler v. Kirtland*, 23 N. J. Eq. Reports, 13; *Bright v. Bright*, 41 Ill. 97; *Leading Cases in Equity*; notes to *Lester v. Foxcroft*, vol. 1, pt. 2, page 1047.

It may often be difficult to determine where the line is between slight and temporary improvements for the tenant's own use, and those which are permanent and valuable. The present case, however, is not one for a conveyance under a parol gift, where the son could not be restored to his former position, but rather for the purpose of correcting the mistake in a deed, where the son and not the father should have been named as the grantee. In this case, however, the son cannot be restored to the position in which he would have been if he had taken his father-in-law's offered \$1000, and invested the amount in Nebraska land, instead of going on to the forty-acre tract, and expending money on it to improve it as his own, and not for his mere temporary convenience as a tenant. Without considering the matter at any greater length, we think the decree of the court below should be reversed, and a conveyance of the fee subject to dower decreed to be made to correct the mistake, unless upon another hearing the evidence should be materially different.

Reversed and remanded.

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THE KANKAKEE AND SOUTHWESTERN RAILROAD
COMPANY

v.

DAVID ALFRED.

1. **ARBITRATION—AWARD—OATH OF ARBITRATORS.**—A submission of all differences between parties respecting a certain matter is sufficient basis for an award, and such award is binding at common law, although the arbitrators were not sworn, the submission not requiring them to be sworn.

2. **AWARD UNDER THE STATUTE—WAIVER OF OATH.**—Such an award would be good as a statutory award, although the statute required the arbitrators to be sworn. The parties may waive the statutory requirement, and proceeding to a hearing before unsworn arbitrators without objection, they will be deemed to have so waived the swearing.

3. **RECITALS IN AWARD.**—It is not necessary in this State that it should appear on the face of the award that the arbitrators were sworn.

4. **IMPEACHING AWARD.**—The affidavit of a person that he heard one of the arbitrators say that they were not sworn, is not sufficient evidence of that fact. An arbitrator should not be allowed to impeach his award by merely saying that he and his co-arbitrators neglected to be sworn.

5. **EXTENT OF AWARD.**—Although in obtaining a right of way by a proceeding under the statute, the compensation should all be in money, yet under this submission of all disputes and controversies on the subject, the award as to fences and crossings was within the power conferred.

6. **ENFORCEMENT OF AWARD.**—The submission being of all matters in dispute with regard to the right of way, the award was not one on which a judgment could properly have been rendered for a sum of money. The payment of the money and conveyance of the right of way were properly made concurrent acts, but the enforcement as a statutory award could only have been compelled under section eight of the statute.

APPEAL from the Circuit Court of Livingston county; the Hon. N. J. PILLSBURY, Judge, presiding. Opinion filed May 2, 1879.

Mr. S. S. LAWRENCE, for appellant; that the court had no jurisdiction to entertain the motion to quash, cited *Low v. Nolte*, 15 Ill. 368; *Moody v. Nelson*, 60 Ill. 229; *Foster v. Durant*, 2 Cush. 545; *Rankin v. Rankin*, 36 Ill. 293.

Mr. A. E. HARDING, for appellee; in support of the motion,

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cited Rev. Stat. 1874, Chap. 10, §§ 1, 5, 6, 16; *Buntain v. Curtis*, 27 Ill. 374.

LELAND, J. On August 22, 1878, the parties to this suit entered into a submission of that date as follows, which was duly signed and sealed:

"Whereas, divers disputes and controversies have arisen and are now pending and unsettled between David Alfred, of the township of Charlotte, in the county of Livingston and State of Illinois, of the one part, and the Directors of the Kankakee & Southwestern Railroad Company, of the county of Cook and State aforesaid, with regard to the right of way of the above named Railroad Company across the said lands of the said David Alfred, in said township of Charlotte, in the county and State aforesaid, being the northwest quarter of section thirty-four, and the northwest quarter of the southwest quarter of section thirty-four, township twenty-seven, range number eight, east of the third principal meridian, in the county of Livingston and State of Illinois.

"Now, therefore, for the purpose of settling and determining such dispute and controversies, it is hereby mutually agreed and understood between the said parties, that the same shall be referred and submitted to the arbitrament and determination of Charles G. Greenwood, and L. T. Stoutemyer and D. B. Puffer, all of said county and State, or all three of them, if they can agree on said award; and the arbitrators, or all three of them, shall make and publish their award in writing, under their hands and seals, and deliver the same to the parties, or either of them who shall desire the same, on or before the 24th day of August, A. D. 1878. And it is hereby further agreed and understood by and between the said parties, that this submission shall be made a rule of the Circuit Court within and for said county of Livingston and State aforesaid, and that judgment may be entered in said court on said award according to the terms.

"And it is hereby further agreed and understood, that the said party of the first part shall name one person as arbitrator, and the party of the second part shall name one party as

arbitrator; that then these two arbitrators shall select the third party as arbitrator. And it is further hereby agreed and understood by and between the said parties, that the three parties named as arbitrators shall all agree on the award; and in case the three parties named cannot all agree in the award, that then the parties of the first and second part shall select other arbitrators."

On the 24th of August, 1878, the arbitrators made and published the following award of that date, viz:

"STATE OF ILLINOIS, }
"Livingston County, } ss.

"Whereas, we, the undersigned, Charles G. Greenwood, L. T. Stoutemyer and D. B. Puffer, of said county and State, having been duly selected as arbitrators, to settle the matters in controversy between David Alfred, of Charlotte township, in said county and State, and the directors of the Kankakee & Southwestern Railroad Company, by virtue of the agreement entered into by said parties, a copy of said agreement being hereto annexed, and marked 'Exhibit A,' having just gone over and carefully examined the proposed route of said railroad over the land described in 'Exhibit A,' the property of said Alfred, as shown by the plat of said land and proposed route of said road in 'Exhibit B,' hereto annexed, and having heard the allegations and proofs of the said parties, and duly considered the same, do award and determine as follows:

"That the said railroad company shall have the right to construct their railroad over the lands of said David Alfred, as shown by the plat on 'Exhibit B,' hereto attached; and for such purpose the said David Alfred shall make to such company a good and sufficient deed to a strip of land eighty feet wide, across his said land, as shown by the proposed route of said road on 'Exhibit B;' and the said railroad company, as they are building said road, upon opening his fence on the north side of his pasture on said land, shall erect a good and sufficient fence to turn stock across the said pasture on the west side of said road; and as soon thereafter as possible shall erect a good and sufficient fence to turn stock on each side of said road its entire length on said land; and shall keep such fences in good

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repair as long as the said route shall be used for railroad purposes. Said company also to build a driveway for stock under their said railroad, at the place marked 'pass' in 'Exhibit B;' and also to build and keep in repair two crossings for teams over said road at the places marked 'crossings' in 'Exhibit B;' and shall also pay to the said David Alfred the sum of four hundred dollars, at any time fixed upon by them, upon giving said Alfred three days' notice of the time when, and the place where, the money will be paid, and at the same time the said Alfred shall deliver to said company the deed aforesaid.

"In witness whereof, we have hereunto set our hands and seals, this 24th day of August, A. D. 1878.

"C. G. GREENWOOD, [SEAL.]

"L. T. STOUTEMYER, [SEAL.]

"DANIEL B. PUFFER, [SEAL.]"

The plat mentioned was made and attached, and it is definite and unambiguous. The award was never filed by appellant, and the action of the court requested under Sec. 7 of Chap. 10, Rev. of 1874, p. 150, by motion for judgment, nor for enforcing the performance by rule, as provided for in section eight of that chapter; but the appellee gave appellant notice that he would move to set aside and quash it, and upon hearing the motion the court did set it aside and quash it. To which summary relief the appellant took exceptions, and appealed to this court.

The only evidence in support of the motion was the affidavit of one Larned, that he heard the arbitrator, Stoutemyer, say that the arbitrators were not sworn.

Against the motion, Jeffery, the superintendent of the railroad company, made affidavit that he tendered Alfred the \$400 on October 1st, 1878, and that he had kept the tender for him.

The grounds of the motion were:

1st. Arbitrators passed on matters not submitted to them.

2nd. Arbitrators exceeded their power.

3d. By their award they delegated to another part of the power conferred upon them by the submission.

4th. The award is uncertain.

5th. Because, by the award it does not appear that the arbitrators were sworn.

6th. Said award cannot be enforced.

On the question whether the action of the court below was right in setting aside and quashing this award—provided the case was one in which the court had jurisdiction to do so—all we can say is, that after a most careful examination of the submission and award, we are not able to discover any reason why the award is not a valid one, and binding upon the parties to it; and that consequently it should not have been set aside and quashed. Whether it was an award upon which a judgment could be rendered under section seven aforesaid, or a rule taken under section eight, is entirely immaterial. Whether the arbitrators were sworn or not, the award was valid and binding as a common law award, and appellant could not, merely because the arbitrators were not sworn, be deprived of its right to sue upon the award or file a bill to enforce its performance. The submission does not require the arbitrators to be sworn, and the award is therefore clearly valid as a common law award. *Eisenmeyer v. Sauter*, 77 Ill. 515; *Smith v. Douglass*, 16 Ill. 34; *Weinz v. Dopler*, 17 Ill. 111; *Tynan v. Tate*, 3 Neb. 388.

There is a conflict of authority as to whether a statute award is valid, if the arbitrators be not sworn, where the statute directs that they shall be. In Louisiana and Kentucky it has been held that the award is void if they be not sworn. *Overton v. Alpha*, 13 La. Ann. 558; *French v. Mosely*, 1 Littell, 247; *Lile v. Barnett*, 2 Bibb. 166. In New Jersey it has been decided both ways. *Ford v. Potts*, 1 Halst. 393; *Inslee v. Flagg*, 2 Dutcher, 368. In New York, Missouri and Wisconsin, and perhaps other states, it is held, and we think with better reason, that the parties may waive the requirement of the statute, and that if they tacitly go on with the hearing before unsworn arbitrators, they shall be deemed to have so waived the swearing. *Howard v. Sexton*, 1 Denio, 440. Same case, 4 Comst. 157; *Browning v. Wheeler*, 24 Wend. 258, *Tucker v. Allen*, 47 Mo. 488; *Hill v. Taylor*, 15 Wis. 190; see also, *Newcomb v. Wood*, Sup. Ct. U. S. Central Law Journal, vol. 8, p. 175. It would certainly be a fraud for one of the parties, noticing the omission, to keep silent, and if the award should be

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favorable, to still remain silent, but if unfavorable, to move to set it aside because of the undisclosed omission; and we are not disposed to consider the neglect a fatal one, even on a motion for judgment under the statute. It is not necessary, in this State, that it should appear upon the face of the award that the arbitrators were sworn. *Duncan v. Fletcher, Breese*, 252. But the question about waiving the oath has not yet been raised in the Supreme Court, to our knowledge.

There is, however, no sufficient evidence that the arbitrators were not sworn. An arbitrator should not be allowed to impeach his award by merely saying that he and his co-arbitrators neglected to be sworn. *Stone v. Atwood*, 28 Ill. 30; *Pulliam v. Pensoneau*, 33 Ill. 375.

As we are unable to discover any defect in the submission or in the award, we think the court below erred in sustaining the motion, whether the award was one presented for judicial action under section seven or eight, or not.

The submission being of all matters in dispute with regard to the right of way, the award was not one on which a judgment could properly have been rendered for a sum of money. *Rev. Stat. of 1874, p. 477, Sec. 10; Peoria, etc. v. Peoria, etc.* 66 Ill. 174. The payment of the money and the conveyance of the right of way should of course be concurrent acts, and they were properly made so by the award. Its enforcement as a statute award could only have been compelled under section eight.

Even if we should concede that the award might in a proper case be set aside on motion of the party filing it, as well as on cross-motion when filed by the opposite party (see *Morse on Arbitration and Award*, 611), it is unnecessary to so decide in this case.

Though in obtaining a right of way by a proceeding in court under the statute, the compensation should all be in money (*Ch. M. & St. P. Railway Co. v. Melville*, 66 Ill. 329), under this submission of all disputes and controversies on the subject, the award as to fences and crossings was within the power conferred.

The parties have selected their own tribunal, and have agreed to abide by its decision, and we can perceive no good reason

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why they should not do so; and therefore the order of the court below is reversed.

Reversed.

PILLSBURY, P. J., took no part in the decision of this case.

WILLIAM WILSON ET AL.

v.

PHILIP CONLIN.

GAMING—NOTE GIVEN FOR ENTRANCE FEE.—The offer by an association of a purse of \$600, divided into four parts, to be given to the winning horses in a race to be run under the rules of the association, is not within the statute prohibiting gaming, any more than the offer of a premium at an agricultural fair; and a note given for the entrance fee for one of the competing horses is not void under the statute as being a gaming contract.

APPEAL from the Circuit Court of LaSalle county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

Mr. L. W. BREWER, for appellants; as to what constitutes gaming within the meaning of the statute, cited Tatman v. Strader, 23 Ill. 495.

As to the difference between an offered premium and a bet: Applegarth v. Colley, 10 Mees. & Wels. 723; Smith v. Alvord, Marion Co. Ind. Superior Ct, (unreported).

Messrs. DUNCAN & O'CONOR, for appellee; that this was a gaming contract within the meaning of the statute, cited Mosher v. Griffin, 51 Ill. 184.

SIBLEY, J. The facts agreed on in this case are, that the Earlville Park Association offered a purse of \$600, divided into four parts, to be given to the winning horses, according to their degree of speed in a three minutes race, to be run under certain regulations imposed by the Association.

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One of its rules required all persons desiring to enter horses to compete for the prize, to pay an entrance fee equal to ten per cent. on the whole sum to be given.

Appellee was permitted by the association to enter his horse "La Salle," to participate in the race for the purpose of winning the purse. In consideration of that permission he executed to the treasurer of the society his promissory note, as follows:

"\$60.00 LA SALLE, August 18th, 1873.

"Eight months after date, I promise to pay to the order Chas. M. Smith, Esq., Treas. sixty dollars at his office, value received, with interest at 10 per cent. per annum.

PHILIP CONLIN."

This note was endorsed *bona fide* to the appellants before it became due, for a valuable consideration paid by them.

Conlin having failed to win the prize or any portion of it, refused to pay the note. Suit was instituted before a justice of the peace to recover the amount of it, and the cause taken to the Circuit Court of LaSalle county, where a judgment was rendered in his favor, from which the plaintiffs appealed to this court.

The only question to be determined, is whether the note was taken in violation of the statute of 1845 then in force, which reads that "all promises, notes, bills, bonds, covenants, contracts, agreements, judgments, mortgages or other securities, or conveyances made, given, granted, drawn, or entered into, or executed by any person or persons whosoever, where the whole or any part of the consideration thereof shall be for any money, property or other valuable thing won by any gaming or playing at cards, dice or any other game or games, or by betting on the side or hands of any person gaming, or for the reimbursing or paying any money or property knowingly lent or advanced at the time and place of such play, to any person so gaming or betting, or that shall during such play so play or bet, shall be void and of no effect."

If this was a gaming transaction within the meaning of the statute, then the note was void, and the decision of the Circuit Court correct.

Gaming is usually defined to be an act done by which something is hazarded on the event of a contest or issue.

The association certainly did not hazard anything by merely receiving an entrance fee. Nor could the simple offer of a premium to the swiftest horse be converted into a stake that in anywise depended upon the result of the race. If so, a prize offered for the finest animal, the handsomest baby, or the greatest production of intellectual effort, would render the offerer liable to the penalties of the statute. Such a construction must tend to discourage all rivalry in art, in science, in the products of the soil, and the improvement in the various breeds known to the animal kingdom. This construction could not have been intended by the legislature. To require a fee in advance for the privilege of being admitted to contest the prize, is no more a gambling process than the offer of a prize to the successful party. There is nothing staked upon the result of a future contingency. The amount to be paid is fixed, and not in any event to be returned, increased or diminished. The law does not prohibit the trial of speed any more than the trial of strength in an animal. Moreover, the party who might pay the entrance fee was under no obligation to engage in the race. How could the association know his object in procuring a right of entry—whether it was merely for the purpose of exhibiting the animal on the ground, or put him to a trial of speed? It simply demanded a fee before the horse could enter, and left the owner to determine what course he would afterwards pursue; or even whether he would avail at all of the privilege purchased was a matter in which the association had no concern. On the payment of the entrance fee, or the execution of a note taken in lieu of the money, the whole business was completed, and nothing left depending upon the happening of an event or the trial of an issue. The prize money was to be paid to the successful party, but the amount was certain, and did not depend at all on the number of entrances. Therefore the entrance fee had no direct connection with the payment of the prize money.

It was decided in *Applegarth v. Calley*, 10 Mees. & Wels. 723, that a sum of money advanced by a third person as a premium to encourage horse-racing was not a wager, and the deposit could be recovered in a suit by the successful party.

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The association in this case was not in the strict sense of the word a party engaged in the racing. It had no horse entered for that purpose, and none was run or proposed to be run on its account. Therefore being entirely indifferent as to the result, it occupied the position of a third party to those engaged in running their horses. It is said in *Smith v. Alvord*, a case decided by the Marion Superior Court, Ind., furnished by counsel of appellants, that "The distinction between the offering a premium by a third person to the successful one of several contestants and a bet between such contestants, is obvious. In the former case, the person who offers the premium stakes nothing. In other words, his liability to pay does not depend upon any contingency. He binds himself absolutely to pay to one or the other of the contestants a certain amount, no matter how the contest may be decided. Although it may be uncertain to whom he will have it to pay, it is certain he will have it to pay to one or the other. There is nothing illegal in this, so long as the contest for which the premium is offered is not in itself unlawful." This case has recently been affirmed by the Supreme Court of the State of Indiana, and not yet reported.

The case instanced by counsel for appellee of the game of keno, where a number of persons each pay into the banker a given sum of money, the amount to be won back by any of them being dependent upon the vagaries of the machinery operated by the banker, presents, it is believed (although we are unacquainted with the game), quite a different case from the one before us. So in respect to that of a given number of persons desiring to organize a horse-race, each one to stake a certain amount, and if one of them were to execute a note to the stakeholder for his stake, could the stakeholder recover in an action upon the note? It may be answered that if the stake were so placed for the purpose of being transferred upon the happening of a future contingency, the arrangement would contain one of the main ingredients of gaming. Indeed, the very idea of stakeholder implies one who holds a deposit to be disposed of according to the result of a future occurrence, which doubtless comes within the provision of the statute.

The case of *Mosher v. Griffin et al.* 51 Ill. 184, the only one

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referred to by appellee as opposed to the view here expressed arose on a claim made by the plaintiff for services rendered in fitting a mare for a race on which money had been bet, and also the board and shoeing of the animal. The court said that the training of the mare "we suppose was for the purpose of gaming," and yet reversed the cause for the reason that the court below refused to allow the plaintiff his claim for board and shoeing. A distinction more refined than that we have attempted to draw between the Earlville Park Association in receiving an entrance fee and offering a reward to the successful horse, and a person betting on the result of the race to be run.

For the reasons indicated the judgment of the Circuit Court is reversed and the cause remanded.

Judgment reversed.

JOHN M. SPRAGUE ET AL.

v.

WARREN S. NOBLE ET AL.

CREDITOR'S BILL—CONVEYANCE IN FRAUD OF CREDITORS.—T. executed to R. and D. his promissory note with warrant of attorney for \$2,000, upon which judgment was confessed three days after its execution, and T.'s property levied upon and sold under the judgment. At the time of giving the note T. was not indebted to the payees, R. and D., but there was a contingent liability to them by reason of being securities on certain bonds executed by T. as principal. *Held*, that the judgment of R. and D., to be valid against claims of creditors of T., must have been founded upon a pre-existing indebtedness; that there being nothing due them, the proceeding was a fraud upon the creditors of T., and as to them a nullity; that the money in the hands of the sheriff having arisen from a sale of T.'s goods under the judgment, and not deposited with him to indemnify R. and D. for being security on T.'s bonds, could not be held for that purpose as against T.'s creditors.

APPEAL from the Circuit Court of Will county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

Messrs. HALEY & O'DONNELL, for appellants.

Sprague et al. v. Noble et al.

Mr. GEORGE S. HOUSE, for appellees.

SIBLEY, J. A creditor's bill was here filed by John Sprague and Ezra Warner, setting up that Nicholas D. Tighe, on the 25th of June, 1877, executed a promissory note to John Ryan and William Davidson for the sum of \$2,000, payable one day after its date. Accompanying this note was a power of attorney to confess judgment upon it. Afterward, on the 27th of June, judgment was confessed in the Will Circuit Court for the amount of the note and interest.

Previous to the confession, the date of the note was, by consent of the parties to it, changed to the 20th of June. An execution issued on the judgment, and by Warren S. Noble, sheriff of the county, was levied June 27th, 1877, upon a stock of goods belonging to Tighe, and on the 9th of July following the sheriff sold the goods for \$1040. A portion of this sum still remained in his hands undisposed of. It is further stated that the note was executed by Tighe to the payees without any consideration, for the purpose of delaying the creditors of Tighe in the collection of their debts.

At the time of the execution of this note Tighe was indebted to the complainants in a considerable amount, upon which indebtedness they on the 5th of July, 1877, recovered a judgment against him for \$105.01.

The next day an execution issued upon this judgment, and was placed in the hands of the sheriff to execute, but has never been satisfied, although the sheriff had remaining in his hands from the proceeds of the sale of the stock of goods owned by Tighe, the sum of \$400, out of which the complainants insist their execution should be satisfied.

On the hearing of the cause Ryan testified that Tighe voluntarily gave him the note upon which judgment was afterwards confessed in his and Davidson's favor, and at that time Tighe did not owe him anything, except a bill of about seventy dollars, which was subsequently paid. Davidson's testimony was that he knew nothing about the giving of the note by Tighe until Ryan told him of it, and that Tighe at the time was not indebted to him. It also appeared in evidence that both

Ryan and Davidson had become security for Tighe upon some official bonds, but neither of them were able to state that they would be called upon to pay anything on account of their suretyship.

Upon this state of facts the Circuit Court denied the relief sought, and dismissed the complainant's bill. From that decree an appeal was taken, and this court is now asked to reverse it, and direct the sheriff to satisfy the complainant's execution out of the moneys in his hands derived from the sale of Tighe's goods, which we think should be done. Counsel for appellees claim that Tighe was a defaulter to a large amount, and Ryan and Davidson, with others, his securities on bonds now in litigation, judgment having been already rendered against a co-security for more than ten thousand dollars, and that the sheriff ought to be allowed to hold the money in his hands as a deposit, to indemnify Ryan and Davidson in case they should be held liable to pay by way of contribution or otherwise.

To the first proposition it is sufficient to observe that the record is destitute of any such proof as indicated; and as to the second, the answer may be that the money was not placed with the sheriff to hold as a deposit, but collected by him on an execution issued from a judgment confessed upon a note, voluntarily executed to the payees without any existing indebtedness. The difference between money thus obtained, and a deposit placed in the hands of another, by way of indemnity, is obvious enough. The judgment, in order to affect creditors, must have been founded upon a pre-existing debt due. Revised Laws 1874, § 66, Ch. 110, p. 782. In the present instance, there having been nothing due the payees of the note at the time it was given, nor when the judgment was confessed, the whole proceeding was a fraud upon the creditors of Tighe, and as to them must be treated as a nullity.

The decree is therefore reversed, with direction to the Circuit Court of Will county to enter a decree directing the defendant, Warren S. Noble, to pay and satisfy the complainant's execution against Nicholas D. Tighe, delivered to him out of the money in his hands derived from the sale of Tighe's stock of goods.

Decree reversed.

Hartley v. Lybarger.

ZENAS HARTLEY
v.
WINFIELD LYBARGER.

1. EVIDENCE—ADMISSIONS.—While it may be true that evidence of admissions by parties is unsatisfactory, it is not necessarily and *per se* of that character. When an admission is made understandingly and deliberately, and is testified to by an intelligent, truthful witness, of good memory, such evidence is highly satisfactory.

2. INSTRUCTIONS.—An instruction should not invade the province of the jury, by directing them what weight should be given to the testimony of any witness.

3. PRACTICE—JUDGMENT AGAINST ALL.—In some cases where a defendant interposes a plea personal to himself, as infancy, bankruptcy or the like, the jury may sever their finding, but where defendants plead jointly it is not error to instruct the jury that a judgment must be against all or none.

APPEAL from the Circuit Court of Woodford county; the Hon. D. McCULLOCH, Judge, presiding. Opinion filed May 2, 1879.

Mr. S. S. PAGE, for appellant; that evidence of admissions are often the most satisfactory evidence, cited *Straubher v. Mohler*, 80 Ill. 21.

The plea of appellant, showing matter in discharge of his personal liability, a judgment could be rendered in his favor, and against the other defendants: 1 Chit. Pl. 45; *Danforth v. Semple*, 73 Ill. 170.

Where the verdict is against the evidence the court will grant a new trial: *Lowry v. Orr*, 1 Gilm. 70; *Scott v. Blumb*, 2 Gilm. 595; *Keaggy v. Hite*, 12 Ill. 99; *Baker v. Pritchett*, 16 Ill. 66; *Miller v. Hammers*, 51 Ill. 175; *Topping v. Maxe*, 39 Ill. 159; *Ray v. Bullock*, 46 Ill. 64; *C. & A. R. Co. v. Gretzner*, 46 Ill. 74; *Maynz v. Zeigler*, 49 Ill. 303.

Messrs. CHITTY, CASSELL & GIBSON, for appellee; that where the evidence is conflicting the verdict will not be set aside, cited *Lowry v. Orr*, 1 Gilm. 70; *Bloom v. Crane*, 24 Ill. 48; *Jenkins v. Brush*, 3 Gilm. 18; *Sullivan v. Dollins*, 13 Ill. 85.

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The judgment should be against all or none: *Kimmel v. Schultz*, Breese, 169; *Russell v. Hogan*, 1 Scam. 552; *Hoxey v. County of Macoupin*, 2 Scam. 36; *Tolman v. Spalding*, 3 Scam. 13; *Frink v. Jones*, 4 Scam. 170; *Wight v. Meredith*, 4 Scam. 360; *Faulk v. Kellums*, 54 Ill. 189; *Kimball v. Tanner*, 63 Ill. 519.

Defendant should have relied upon his personal defense alone: *Tolman v. Spalding*, 3 Scam. 13; *Tidd's Pr.* 682; 3 Cowen, 374; 1 Chit. Pl. 45.

Where substantial justice has been done the verdict will not be disturbed: *Leigh v. Hodges*, 3 Scam. 15; *Gillett v. Sweat*, 1 Gilm. 475; *Elam v. Badger*, 23 Ill. 498; *Wheeler v. Shields*, 2 Scam. 348; *Calhoun v. O'Neal*, 53 Ill. 354; *Dishon v. Schorr*, 19 Ill. 59; *Schwarz v. Schwarz*, 26 Ill. 81; *Hall v. Growfe*, 52 Ill. 421; *Warren v. Dickson*, 27 Ill. 115.

PILLSBURY, P. J. Action of assumpsit on promissory note, brought by appellee against the appellant, Hartley, Thad. Page, and Joseph Morley. Morley failing to plead, default was entered as to him. Pleas of the general issue and payment were pleaded jointly by defendant, Page, and appellant. The appellant also filed separate pleas that he was surety, and that appellee extended the time of payment, etc., whereby he is discharged. A trial was had and a verdict against all the defendants, upon which judgment was rendered, and Hartley appeals.

The main contest in the case was, whether the appellee had extended the time of payment for a valuable consideration, without the consent of Hartley. Upon this point the principal defendant, Page, and the appellee were in conflict, and the appellant called one Salmon Allen, who testified, in substance, that he heard appellee tell Page that he, appellee, had extended the time twice, and that Page had paid him for both extensions, the last time giving him three dollars.

The fifth instruction given for the plaintiff below, was directed at this testimony of Allen, and designed to destroy its effect with the jury. Instructions should not invade the province of the jury by directing them what weight should be given to the testimony of any witness.

Hartley v. Lybarger.

The remarks of Mr. Justice Walker in *Straubher et al. v. Mohler*, 80 Ill. 21, are very much in point in this case:

“Whilst it may be true as a general rule that evidence of admissions by parties is unsatisfactory, it is not necessarily *per se* of that character. It may be, and frequently is of the most satisfactory of all verbal testimony. When an admission is made understandingly and deliberately, and is testified to by an intelligent, truthful witness, of good memory, all know that such evidence is highly satisfactory, and free from suspicion; but when casually made, and to an inattentive person, of bad memory, or such a want of apprehension as to make it doubtful whether he fully understood or heard what was said, or his manner shows that he is strongly biased in favor of the party calling for the admission, then, of course, such evidence is weak, and should be closely scrutinized. But these are circumstances for the consideration of the jury.”

To the same effect are the cases of *Young v. Foute*, 43 Ill. 33, and *Frizell v. Cole*, 29 Ill. 465.

Under the authority of these cases, the fifth instruction was erroneous and should have been refused.

As this case must be submitted to another jury, we refrain from expressing any opinion upon the merits of the case.

It is urged by counsel for appellant, that the court erred in instructing the jury that they must find against all the defendants or none, and refusing to instruct that they could find in favor of Hartley and against the others. Under the pleadings in this case we see no error in such action of the court. In some cases, where one defendant interposes a plea personal to himself, as infancy, bankruptcy or the like, the practice is allowable to permit the jury to sever in their finding.

It is not necessary to determine whether such instruction would have been improper had Hartley severed in his defense in all his pleas, but having joined with his co-defendant in the plea of the general issue and payment, we are of the opinion that the instruction was right under the issues formed.

For the error indicated, the judgment must be reversed and the cause remanded.

Reversed and remanded.

Axtell v. Cullen.

ALONZO E. AXTELL

v.

JOHN CULLEN.

1. DEBTOR AND CREDITOR—PREFERENCE.—A debtor has an undoubted right to secure one creditor so far as he is able, even if in so doing he defeats the collection of the claim of another creditor, unless his real purpose in so doing was to hinder or defeat the other creditor in the collection of his claim.

2. KNOWLEDGE BY PREFERRED CREDITOR OF THE CLAIM OF ANOTHER.—The mere knowledge by the creditor thus secured of the existence of other claims against the debtor will not affect his rights, there being no proof that in taking security for his debt he had any other object in view than to secure himself.

APPEAL from the Circuit Court of McHenry county; the Hon. C. W. UPTON, Judge, presiding. Opinion filed May 2, 1879.

Mr. JOHN B. LYON, for appellant; that the leasing of the land does not bring the case within the Statute of Frauds, so as to make the crop subject to sale on execution in favor of creditors, cited 1 Story's Eq. Jur. § 367; 2 Kent's Com. 442; Story on Sales, 653.

Upon the right of a debtor to prefer one creditor to another: *Morris v. Tillson*, 81 Ill. 607; 2 Kent's Com. 521; *Fassett v. Traber*, 20 Ohio, 540; *Wall v. Lakin*, 13 Met. 167; *Johnson v. Whitwell*, 7 Pick. 74; *Marbury v. Burks*, 7 Wheat. 566.

It must be shown that both vendor and vendee were guilty of a fraudulent intent: *Brown v. Riley*, 22 Ill. 46; *Gridley v. Bingham*, 51 Ill. 153; *Gray v. St. John*, 35 Ill. 222; *Hessing v. McCloskey*, 37 Ill. 341; *Hatch v. Jordon*, 74 Ill. 414; *Kerr on Fraud and Mistake*, 201.

If the act may be traced to an honest motive, such motive should be preferred. *McConnel v. Wilcox*, 1 Scam. 344; *Bowden v. Bowden*, 75 Ill. 143.

Mere suspicion is not sufficient to establish fraud: *Bullock v. Narrott*, 49 Ill. 62.

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A sale of goods by a debtor or creditor will be presumed *bona fide*, in the absence of proof to the contrary: Jewett v. Cook, 81 Ill. 260.

And the burden is upon the party claiming the contrary to establish fraud: Hall v. Jarvis, 65 Ill. 202; McConnell v. Wilcox, 1 Scam. 344; Clark v. Groom, 24 Ill. 316; Blow v. Gage, 44 Ill. 208.

Mr. O. H. GILLMORE and Mr. J. P. CHEEVER, for appellee; that a contract made with intent to defraud creditors is fraudulent as to them, cited 2 Kent's Com. 512; Lowry v. Orr, 1 Gilm. 70; Deere v. Lewis, 51 Ill. 254; Boies v. Henney, 32 Ill. 130.

A purchase of property with knowledge that the sale is intended to defraud creditors, is void: Gardiner v. Otis, 13 Wis. 514.

Fraud may be established by circumstantial evidence: Swift v. Lee, 65 Ill. 336; Reed v. Noxon, 48 Ill. 323; Bryant v. Simon-eau, 51 Ill. 324; Rothgerber v. Gough, 52 Ill. 436; Carter v. Gunnels, 67 Ill. 270.

The crops in question were not exempt unless the exemption was claimed by the defendants in execution: Rev. Stat. 1874, 498, § 12; Cook v. Scott, 1 Gilm. 333; McCluskey v. McNeely, 3 Gilm. 578.

Objection that an improper paper was handed to the jury on retiring, must be made at the time: Smith v. Wise, 58 Ill. 142.

The reading of improper testimony to the jury should be taken advantage of by an instruction of the court to disregard it: Kenyon v. Sutherland, 3 Gilm. 99.

Where the instructions, taken as a whole, fairly present the case, no error is committed: Cusick v. Campbell, 68 Ill. 508; Stowell v. Beagle, 79 Ill. 525; T. W. & W. R. R. Co. v. Ingraham, 77 Ill. 309.

The verdict will not be disturbed unless clearly against the weight of evidence: Palmer v. Weir, 52 Ill. 241; Hope Ins. Co. v. Lonergan, 48 Ill. 49; Chilicothe Ferry, etc. Co. v. Jameson, 48 Ill. 281; Chicago City R'y Co. v. Young, 62 Ill. 238; Tucker v. Watts, 64 Ill. 416; Foos v. Sabin, 84 Ill. 565; Young v. Silkwood, 11 Ill. 36.

Where substantial justice has been done, the giving of an

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improper instruction will not be ground for a new trial: Dishon v. Schorr, 19 Ill. 59; Schwarz v. Schwarz, 26 Ill. 81; Hall v. Groufe, 52 Ill. 421; Stobie v. Dills, 62 Ill. 433; Foos v. Sabin, 84 Ill. 564.

SIBLEY, J. This suit originated before a justice of the peace of McHenry county, on a claim made by John Cullen against the appellants for the crops raised upon forty-four acres of land belonging to Florence and Eliza McCarty. The case was taken by appeal to the Circuit Court of that county, where a trial was had, which resulted in a verdict for the plaintiff, and damages assessed at \$125. From the judgment rendered on that verdict the defendants appealed to this court.

The facts proven on the trial were few and simple. On the 15th of March, 1877, John Cullen recovered a judgment against the McCartys for the sum of \$196. An execution issued upon this judgment, and was levied on the crops of wheat, corn and oats grown on the place occupied by Florence and Eliza McCarty. At the constable's sale under the execution, in June, 1877, the crops were struck off to the plaintiff, Cullen, for one dollar and fifty cents, though he estimated their value at from \$125 to \$150.

Florence and Eliza McCarty having for some time been owing A. E. Axtell a considerable amount, four hundred dollars of which remained unsecured, Axtell, becoming anxious to secure a portion of his debt, on the 25th of March, 1877, leased of the McCartys (they being unable to procure the requisite means for cultivation), the land on which the grain in dispute was grown. Axtell paid the rent of \$175 to the lessors in advance, by giving them credit for that amount on their indebtedness. He also furnished the seed, prepared the ground, hired all the help necessary to cultivate the land, gathered in the harvest and made the crop ready for market.

It was proven that Axtell, when he leased the land of the McCarty's, knew of Cullen's judgment against them. He also employed Florence McCarty and his step-son to help till the ground leased, and paid them for their labor at the end of the season a span of horses worth \$125. These are the principal

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circumstances relied on by the appellee, who was his only witness on the trial of the cause, to show a fraudulent intent on the part of Axtell to hinder and delay him in the collection of his judgment against the McCartys. Axtell and Florence McCarty both testified that no such intent existed. But that the land was rented by the parties for the purpose only of liquidating a just indebtedness.

Upon this evidence the jury found that Cullen was entitled to recover of the appellants the value of the crops raised on the land leased to Axtell. By what process of reasoning they arrived at that conclusion, we are unable to discover. There was no question but what Axtell's claim was an honest one. Nor can it be disputed that he had a perfect right to secure as much of it as he was able to, even if in so doing he defeated Cullen in the collection of his judgment, unless that was his real purpose in the transaction. Bump on Fraudulent Conveyances, 218, and cases cited in note 5; *Ewing v. Runkle*, 20 Ill. 448; *Gray v. St. John*, 35 Id. 222; *Hesing v. McCloskey*, 37 Id. 341; *Francis v. Rankin et al.* 34 Ill. 169.

It is contended by counsel for appellee, that inasmuch as he was informed by Florence McCarty that things had been so fixed as to prevent Cullen from getting anything without a fight with Axtell, the jury had a right to infer a fraudulent intent on the part of Axtell in renting the land. Concede that appellee's statement was true, although McCarty denied it, we know of no authority for holding that Axtell could in anywise be affected by it. For as to him, it was at best but hearsay evidence, and the whole record is destitute of proof that Axtell had any other object in view by leasing the land of the McCartys, except to secure at least a portion of his claim.

We do not deem it necessary to notice the other reasons pointed out for reversing the judgment appealed from, since the error assigned for not granting a new trial is well taken. However much the court may be disinclined to interfere with the verdict of a jury upon a question of fact, the one before us is so clearly against the weight of evidence that it should have been set aside and a new trial awarded. The judgment of the Circuit Court is therefore reversed and the cause remanded.

Reversed and remanded.

ARTHUR FLANSBURG

v.

JOHN BASIN.

3	531
42	190
3	531
88	427

1. VICIOUS ANIMALS—LIABILITY OF OWNER OF DOG ACCUSTOMED TO BITE.—It is not necessary to show that the keeper of a dog has allowed him to bite a large number of his neighbors, or their animals, before he commences to be liable; but it is enough to show that there is within his knowledge a probability that he may do so. If he have reasonable grounds to suppose that the dog may do so, he must restrain him, or be liable for the consequences.

2. EVIDENCE—IMPEACHMENT.—The jury have a right to believe a witness, notwithstanding they may think his character bad, and the court ought not, by an instruction, tell them that they should not do so. It is not allowed to impeach a witness by proof of general bad character, and an instruction to that effect is bad.

3. JOINT LIABILITY.—The court say that in this case it is not necessary to consider whether there can be a joint liability of owners for a joint attack of their dogs. As it is not so with cattle, it is probably not so with dogs.

APPEAL from the Circuit Court of Henry county; the Hon. ARTHUR A. SMITH, Judge, presiding. Opinion filed May 2, 1879.

Messrs. MOCK & HAND and Mr. THOMAS G. AYRES, for appellant: that under a plea of not guilty in this class of actions, no defense other than such denial is admissible: 1 Addison on Torts, § 585; 2 Whar. on Ev. § 1295.

It was not necessary to prove a series of acts of viciousness: Smith v. Pelot, 2 Str. 1264; Arnold v. Norton, 25 Com. 92; Kittridge v. Elliott, 16 N. H. 77; Loomis v. Terry, 17 Wend. 406; Cockerham v. Nixon, 11 Ired. 269; Mann v. Wieand, 1 Monthly Jur. 94; Worth v. Gilling, L. R. Q. C. P. 1; Judge v. Cox, 1 Stark. 285; Fleming v. Orr, 2 Macq. 25; Meibus v. Dodge, 38 Wis. 300; Rider v. White, 65 N. Y. 54; 1 Addison on Torts. § 290.

After one act of viciousness, if the keeper have notice of such act, and suffer the animal to run at large, he is liable: Laverom v. Mangianti, 41 Cal. 138; Buckley v. Leonard, 4 Denio, 500;

Flansburg v. Basin.

Wheeler v. Brandt, 23 Barr, 324; Loomis v. Terry, 17 Wend, 496; Marsh v. Jones, 21 Vt. 378; Popwell v. Pierce, 10 Cush. 509; Sherfay v. Bartlett, 4 Sneed, 58; Burden v. Barnett, 7 Ala. 169.

The gist of the action is the keeping after knowledge of its vicious propensity: May v. Burgett, 9 O. B. 101; Wheeler v. Brandt, 23 Barr, 324.

An instruction that the dog must attack horses attached to vehicles or the jury could not find defendant guilty, limits plaintiff's right of recovery to an extent not warranted in law, and is erroneous; Chittenden v. Evans, 48 Ill. 52; Bradshaw v. Mayfield, 24 Tex. 481; Smithwick v. Indross, 24 Tex. 488; Roots v. Lynner, 10 Ind. 92; Wells on Questions of Law and Fact, § 407.

It is not the duty of the court to instruct when the instruction assumes facts not proved: I. & St. L. R. R. Co. v. Horst, 9 Chicago Legal News, 114; Michigan Bank v. Eldred, 9 Wall. 544; Ward v. U. S. 14 Wall. 28; Railroad Co. v. Gladden, 15 Wall. 401.

The failure of plaintiff to exercise ordinary care, unless such failure contributed to the injury, will not prevent a recovery: Stumps v. Kelly, 22 Ill. 140; T. W. & W. R. R. Co. v. O'Connor, 77 Ill. 391; C. & A. R. R. Co. v. Mock, 72 Ill. 141; Centralia v. Scott, 59 Ill. 129; C. & A. R. R. Co. v. Murray, 62 Ill. 326; Daniels v. Clegg, 27 Mich.

Instructions should be based on evidence: Coughlin v. The People, 18 Ill. 266; Chapman v. Cawrey, 50 Ill. 512.

A contradiction, in order to affect the credibility of a witness, must be on a material point in issue, and the witness must have willfully sworn falsely: Crabtree v. Hagenbaugh, 25 Ill. 235; Meixell v. Williamson, 35 Ill. 529; Brennan v. The People, 15 Ill. 511; Chicago v. Smith, 48 Ill. 107; U. S. Ex. Co. v. Hutchins, 58 Ill. 44; Pope v. Dodson, 58 Ill. 360; 1 Greenleaf's Ev. § 462.

Proof of general bad character is not sufficient to impeach a witness: Frye v. Bank of Illinois, 11 Ill. 332; Eason v. Chapman, 21 Ill. 33; Crabtree v. Kile, 21 Ill. 180; Dimick v. Downes, 82 Ill. 570; 1 Greenleaf's Ev. § 461.

Upon the question of damages: *Fulsom v. Town of Concord*, 46 Vt.

Appellant was entitled to a new trial on showing that one of the jurors had falsely stated on his examination that he had no knowledge of the case about to be submitted, when in fact he had full knowledge of all the facts: *Nomaque v. The People*, Breese, 145; *Guykowski v. The People*, 1 Scam. 476; *Smith v. Eames*, 3 Scam. 76; *Sellars v. The People*, 3 Scam. 412; *Venum v. Harwood*, 1 Gilm. 659; *Swarnes v. Sitton*, 58 Ill. 155; *Essex v. McPherson*, 64 Ill. 349; *Spurck v. Crook*, 19 Ill. 415.

It is sufficient if enough of plaintiff's allegations is proved to afford ground for maintaining the action: 1 *Phillip on Ev.* 504; 2 *Chit. Pl.* 597; *Pickering v. Orange*, 1 Scam. 338; *Panton v. Holland*, 17 Johns. 92.

Where it is apparent the jury misunderstood the evidence or were misled by the instructions, a new trial should be given: *Higgins v. Lee*, 16 Ill. 495; *Robertson v. Dodge*, 28 Ill. 161; *Southworth v. Hoag*, 42 Ill. 446; *Haycroft v. Davis*, 49 Ill. 445; *Booth v. Hymys*, 54 Ill. 363; *C. B. & Q. R. R. Co. v. Stump*, 55 Ill. 367; *R. R. I. & St. L. R. R. Co. v. Coultas*, 67 Ill. 398.

Messrs. SHEPARD & MARSTON, for appellee; that where the evidence is conflicting, the verdict will not be set aside unless clearly against the weight of evidence, cited *C. & R. I. R. R. Co. v. Hutchins*, 34 Ill. 108; *C. & R. I. R. R. Co. v. Crandall*, 41 Ill. 234; *T. P. & W. R'y Co. v. McClannon*, 41 Ill. 238; *Davis v. Hoepfner*, 44 Ill. 306; *Hope Ins. Co. v. Lonegan*, 48 Ill. 49; *Sawyer v. Daniels*, 48 Ill. 269; *C. F. R. & B. Co. v. Jameson*, 48 Ill. 281; *Palmer v. Weir*, 52 Ill. 341; *Varner v. Varner*, 69 Ill. 445; *Kightlinger v. Egan*, 75 Ill. 141; *Chapman v. Burt*, 77 Ill. 337; *Summers v. Stark*, 76 Ill. 208; *T. W. & W. R. R. Co. v. Moore*, 77 Ill. 217; *Bishop v. Busse*, 69 Ill. 403; *City of Ottawa v. Sweely*, 65 Ill. 434.

Even where the evidence was such that the jury would have been justified in finding the other way: *C. & N. W. R. R. Co. v. Ryan*, 70 Ill. 211; *Papineau v. Belgrade*, 81 Ill. 61; *McClelland v. Mitchell*, 82 Ill. 35; *Corwith v. Colter*, 82 Ill. 585.

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Under the general issue in this case defendant could prove any matter tending to show that his dog did not commit the injury: 1 Chi. Pl. 794; Dean v. Blackwell, 18 Ill. 336.

The owner of domestic animals is liable when, knowing their vicious habits, he keeps them, whether negligent or not: Poplewell v. Pierce, 10 Cush. 509; 1 Hilliard on Torts, 569; Cord v. Case, 5 C. B. 622; 1 Addison on Torts, 283.

But this does not relieve the party injured from the exercise of ordinary care: Kightlinger v. Egan, 65 Ill. 235; Wormley v. Gregg, 65 Ill. 251.

The instruction in regard to competency of the witnesses was correct: Springdale Cem. Asso'n v. Smith, 24 Ill. 480; Miller v. People, 39 Ill. 457; Crabtree v. Hagenbaugh, 25 Ill. 233.

It is not proper to repeat in an instruction a principle already given in an instruction: Chicago v. Hesing, 83 Ill. 204; Longergan v. Courtney, 75 Ill. 580.

Appellant's instruction was properly refused, as it gives undue prominence to parts of the testimony: Hewitt v. Johnson, 72 Ill. 513; Holmes v. Hale, 71 Ill. 552; Ogden v. Kirby, 79 Ill. 555.

Affidavits of jurors cannot be received to show misconduct on the part of one of their number: Cleem v. Smithe, 5 Hill, 560; Dorr v. Fenno, 12 Pick. 521; Hannum v. Belchertown, 19 Pick. 313; Murdock v. Sumner, 22 Pick. 157; Cook v. Castner, 9 Cush. 278; Folsom v. Manchester, 11 Cush. 334; B. & W. R. Co. v. Dunn, 1 Gray, 105; Chadbourn v. Franklin, 5 Gray, 212; Allison v. The People, 45 Ill. 37; Peck v. Brewer, 48 Ill. 54.

LELAND, J. Appellant brought an action on the case against appellee, alleging that he kept a ferocious and mischievous dog, knowing that he was accustomed to attack, chase and bite horses, etc.

In the first count the word "horses" alone is used. In the second the words "horses as well as other domestic animals" are used, and in the third count the words are "horses and teams attached to vehicles." It is also alleged that appellant

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on May 25th, 1875, was going home from a debate at the school house one night, on horse-back, and that when passing along the road in front of appellee's house, the said dog came out and bit his horse, and that thereupon the horse threw him and broke his leg. The verdict was in favor of appellee.

Basin and his son-in-law, Robert Julian, lived opposite each other, and the two together had three dogs; appellee had a large black and white one and a little rat terrier, and Julian had a common yellow shepherd slut. All three were either principals or accessories in the attack—all joined in barking extensively. Appellant says however, that it was the large black and white one which bit his horse, and he is the only person who could tell how it was. It is not necessary to consider whether there can be joint liability of owners, for a joint attack of their dogs; as it is not so with cattle, it is probably not so with dogs. *Westgate v. Carr*, 43 Ill. 450.

We are not disposed to find any fault with the court below for allowing it to be proved whether the slut or the large black and white dog actually did do the biting, by showing which one was the more likely to have done so, by proving which one's daily habits of life were of a biting, and which of a mere barking character. If the difference of size and sex would raise any presumptions, it would seem proper to explain and rebut them in this way, as tending to show that appellant was mistaken.

The questions of fact are quite elaborately discussed, but we deem it only necessary to say on that subject, that if there were no erroneous ruling, a verdict either way should stand, unless one for plaintiff were for an excessive amount, and that in such case of conflict there should be reversal for error in instructions.

If the allegations in the declaration had been that appellee was the owner of the dog, instead of that he kept the dog, it would seem under the authority of *Wormley v. Gregg*, 65 Ill. 251, that the case for appellant would have been stronger. Before examining the instruction, we may say on the subject of dogs generally, that their rights are better protected now than they were in more barbarous times. In *Smith v. Pelah*, 2 Strange, 1264, the Chief Justice ruled that "if a dog has once bit a man, and the owner having notice thereof keeps the

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dog and lets him go about or lie at his door—an action will lie against him at the suit of a person who is bit, though it happened by such person's treading on the dog's toes, for it was owing to his not hanging the dog on the first notice; and the safety of the king's subjects ought not afterwards to be endangered."

In *Kightlinger v. Egan*, 65 Ill. 235, Justice Sheldon, in a more just and humane spirit, ruled that a dog wantonly kicked, might lawfully bite in self-defense. The dog in this case, however, would not be justified, after his passions had had time to cool, in making the attack, simply because appellant may have two or three months before, unnecessarily struck at him with a whipstock while passing.

The second instruction given for appellee, was to the effect that unless the dog was accustomed to chase and bite horses and teams hitched to vehicles, there could be no recovery.

Under the first and second counts, there could be a recovery, though the dog was accustomed to attack horses, or other domestic animals not attached to vehicles, and always avoided doing so whenever they were so attached.

That a dog like men, may have idiosyncracies, is not only a well known fact, but it has the sanction of judicial authority. It is held in *Kightlinger v. Egan*, *supra*, that a "dog might have been of savage and ferocious disposition as respected other animals, and yet of a different disposition toward persons."

Why might not the dog have had the disposition to attack horses without riders, or one with a rider, and yet have refrained, from prudential motives, when there was an ally of the horse or horses, who could defend them from the fortified position of a two-horse wagon, or a buggy? If the dog had chased and bitten animals before, or shown a disposition to do so, and the keeper knew it, he must restrain him or take the consequences; see *Stumps v. Kelly*, 22 Ill., 140, where the law and the gospel on the subject are well considered by Justice Walker. It is not necessary that the inclination to do so should have become fixed and customary. If it be only on rare occasions, with the keepers knowledge, it is enough. It is not necessary to prove all that is alleged, but only enough to make a cause of action, under some one count.

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We perceive no objection to the third of appellee's given instructions. If the jury could not tell from the evidence whether it was Julian's slut or appellee's dog which caused the horse to throw his rider, they cannot say that appellee's dog did it.

The fourth improperly calls attention to particular portions of the evidence, for the consideration of the jury, viz.: whipping up the horse, striking at the dogs with a rope halter, and the skittishness of the horse, giving them undue prominence. *Frame v. Badger*, 79 Ill. 441; *Ogden v. Kirby*, 79 Ill. 556; *McCartney v. McMullen*, 38 Ill. 237; *Evans v. George*, 80 Ill. 51; *Hatch v. Marsh*, 71 Ill. 370. Though for this alone there might not be a reversal. *Grube v. Nichols*, 36 Ill. 92.

It is also said that a failure to exercise ordinary care in either one of these particulars, though it may not in any respect have tended to cause the fall from the horse, will prevent a recovery.

Appellant may not have struck at the dog with ordinary care, and yet this may not have had anything to do with causing the rider to be thrown. *City of Centralia v. Scott*, 59 Ill. 129. Of course, if the negligence, if any, of appellant, did not contribute to the fall, it is immaterial. *C. & A. R. R. Co. v. Murray*, 62 Ill. 326.

By the 6th, the jury are informed that they should entirely disregard the evidence of witnesses, who have been successfully impeached by direct contradiction, or proof of general character, except where corroborated by other competent evidence.

The jury have a right to believe a witness, notwithstanding they may think his character bad. The worst man and the greatest liar must be believed under some circumstances, and the court ought not to have said to the jury that they should not do so, instead of saying that they may do so or not, as they think best. Jurors, not judges, are to determine the weight to be given to evidence. Suppose there are but two witnesses, and they flatly contradict each other, may not the appearance and manner of testifying of the one, or the greater probability of his tale, turn the scale, and would a jury thus instructed consider such things as other competent evidence? Nor is it true that proof that a man's character is bad would render it necessary

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for a jury, who did not desire to, to disregard his evidence entirely. Men who are very bad in some other respects, may not be untruthful. Even though all the people in his neighborhood might swear that a witness's character for truth was bad, and that they would not believe him on oath, this does not take away from the jury their right to believe him, and a court should not tell them that it did. It is not allowed in this State to prove that a witness's general character is bad in order to impeach him, and consequently an instruction which says it does, is bad; it must be limited to character for truth and veracity. Other defects in the instruction are pointed out, but it is not necessary to pursue this subject further.

The modification of appellant's 1st, 2nd, 4th and 10th instructions was proper. We understand the law in this State to be that plaintiff must prove affirmatively that he exercised ordinary care, or the negative, that he was not negligent, whichever way it may be stated. *Dyer v. Talcott*, 16 Ill. 300; *C. B. & Q. etc. v. Gregory*, 58 Ill. 272, and not that each party must prove the opponent's negligence—the plaintiff to entitle him to recover, and the defendant to prevent a recovery, as is held in some other States. *Shearman & Redfield on Negligence*, sections 43 and 44, and notes. This is an exception to a general rule, which allows that a necessary element of a plaintiff's case need not be alleged, but requires that it must be proved. *C. & N. W. R. R. Co. v. Cross*, 73 Ill. 394. The Appellate Court of this district has held that an instruction is erroneous under the foregoing authorities and others, which states that "if there is no proof of a want of care on the part of the plaintiff, it should be presumed that she was careful rather than that she was careless." *City of Mendota v. Fay*, 1 Bradwell, 418. In the case of the *C. B. & Q. R. R. Co. v. Van Patten*, 74 Ill. on p. 94, it is, however, perhaps inaccurately intimated that where there is no evidence of what the intestate's conduct was, plaintiff, who was administratrix, might recover upon proof of defendant's negligence only. Inaccurate, because if such be a necessary element of plaintiff's case, then under the maxim that "what doth not appear doth not exist," plaintiff fails to make a case; and not unlike this last case is that

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of Ill. Cent. R. R. Co. v. Cragin, Adm. 71 Ill.; see the 7th instruction on p. 184.

Appellant's 6th instruction, being on the measure of damages, and there not having been any to measure, it is unimportant whether it was correct or not. There was no error in the refusal of the seventh instruction asked by appellant, but we do not deem it necessary to comment on this, nor on the questions as to the supposed misconduct of the juror.

We select from appellant's brief, the following cases, explanatory of the views taken in this opinion, as to the liability in such cases. *Arnold v. Norton*, 25 Conn. 92; *Loomis v. Berry*, 17 Wend. 496; *Meibus v. Dodge*, 38 Wis. 300; *Wheeler v. Brant*, 23 Barb. 324; *Marsh v. Jones*, 21 Vermont, 378; *Rider v. White*, 65 N. Y. 54; *Laverone v. Mangiante*, 41 Cal. 138; *Powell v. Pierce*, 10 Cush. 509; *Sherfay v. Bartlett*, 4 Sneed, 58; *Shearman & Redfield on Negligence*, section 190, and following sections: from which it will appear that it is not necessary to show that the keeper of the dog has allowed him to bite a very large number of his neighbors or their animals, before he commences to be liable, but that it is enough to show that there is, with his knowledge, a probability that he may do so. If he have reasonable grounds to suppose that the dog may do so, he must restrain him, or take the consequences.

For the errors aforesaid, the judgment is reversed and the cause remanded.

Reversed and remanded.

MARY E. PRENTISS

v.

THOMAS MOORE.

REPLEVIN—RETURN OF PROPERTY.—It is error to award a return of the property replevied, on dismissal of the replevin suit, where it appears the plaintiff never obtained possession of the property under the writ. So, where defendant was in the act of removing a house and barn when they were seized in replevin, moved back into the same field from which they had been

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taken, and left in possession of the defendant, the object of the replevin writ has never been executed, there is nothing to return, and a writ of *retorno habendo* should not have been issued.

APPEAL from the City Court of Aurora; the Hon. FRANK M. ANNIS, Judge, presiding. Opinion filed May 2, 1879.

Mr. A. J. HOPKINS and Mr. A. G. McDOLLE, for appellant; contending that there was no legal execution of the writ of replevin, cited Rev. Stat. Chap. 119, § 7.

Mr. B. F. PARKS, for appellee.

PILLSBURY, P. J. An action of replevin was commenced in the court below by appellant to recover from the defendant a frame dwelling house and one barn, alleged to be personal property in the affidavit.

The return of the officer who served the writ is as follows:

JULY 9th, 1877.

"Served this writ by reading the same to Thomas Moore, and by taking the within described property and removing the same to the premises in said city of Aurora, from which he had taken them, and left them in the possession and under the control of said Moore.

"CHAS. S. MIXER, Sheriff,
"R. B. GATES, Deputy."

Appellant having failed to file his declaration ten days before the second term, the court dismissed the suit, and upon motion of the defendant ordered that a writ *de retorno habendo* should issue for a return of the property.

From this order the plaintiff appeals to this court.

Evidence was introduced upon the hearing of the motion in the court below which is preserved by a bill of exceptions.

Gates, the deputy sheriff who served the writ, testified as follows:

"I was deputy sheriff July 9th, 1877, and for some time previous and since then. I served the writ of replevin in this case. On the day I served the writ I found the house and

barn mentioned in the writ on a lot adjacent to the one on which they had been erected. The defendant was in the act of moving the house, and was then in possession of the house; he and his family were living in it. The house had been moved from a stone foundation. I took the house by virtue of the writ, and under the direction of defendant moved it back into the field from which the defendant had taken it, in a different place, but near where it originally stood. I placed the house where the defendant directed me to place it, and left it in the possession of the defendant. He and his family were then residing in the house. The return I made on the writ is exactly and literally true."

It is apparent that the plaintiff never obtained the possession of the property by virtue of the writ of replevin, but that the same was placed by the officer where he was directed by the defendant, and the defendant left in sole charge and possession of it.

Under such circumstances we fail to see how a return of the property to the defendant can be awarded. There is nothing to return; the writ has never been executed, and the object of the suit, which is to obtain possession of the property, has never been accomplished.

In such case we are of the opinion that upon a dismissal or a voluntary discontinuance of the suit in replevin these facts can be shown, and thus prevent the order for a return of the property. *Buckmaster v. Beames*, 4 Gilm. 443. It cannot be otherwise than improper to award a return of the property where it has never been delivered to the plaintiff upon the writ.

For this reason alone we think the court below should have overruled the motion of defendant for an order for the return of the property.

We have, however, looked into all the evidence in the case, and if we were to consider it as determining the rights of the parties to the property, we should have no hesitation in holding that the writ, under all the circumstances in proof, was properly issued. It is not necessary, however, to determine this question.

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The order awarding the writ *de retorno habendo* must be reversed.

Order reversed.

J. H. PAXTON

v.

FREDERICK SCHICK ET AL.

REPLEVIN.—This case presents the same questions as the preceding case, and is reversed for the same reasons there given.

APPEAL from the City Court of Aurora; the Hon. FRANK M. ANNIS, Judge, presiding. Opinion filed May 2, 1879.

Mr. A. J. HOPKINS, for appellant.

PILLSBURY, P. J. This case is the same in all respects as the case of Mary E. Prentiss v. Thomas Moore, decided at the present term, and for the reasons therein given the order awarding a return of the property must be reversed.

Order reversed.

CLAYBURG, EINSTEIN & Co.

v.

HENRY B. FORD ET AL.

1. WRIT—MISNOMER—WHEN NOT MATERIAL.—A writ of attachment was sued out in the firm name of Clayburg, Einstein & Co., but as there was a declaration filed in the cause in which the full names of the members of the firm were given, and an appearance by the defendant, the irregularity in the writ became unimportant. It was not such an irregularity as would render the writ void or sufficient to reverse.

2. LEVY OF WRIT BEFORE DEED RECORDED.—The writ of attachment was levied upon the land at eleven o'clock A. M., and the deed by defendant conveying the land to another, filed for record at two o'clock P. M. of the same

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day. The levy of the attachment being prior in time, is stronger in right and must prevail, there being no evidence that plaintiff in attachment had actual or constructive notice of the existence of the deed.

ERROR to the Circuit Court of Peoria county; the Hon. D. McCULLOCH, Judge, presiding. Opinion filed May 2, 1879.

Messrs. CRATTY BROS. & ULRICH, for plaintiffs in error; that the levy constituted a prior lien, cited *Martin v. Dryden*, 1 Gilm. 187; *Doyle v. Teas*, 4 Scam. 202; *Kennedy v. Northrup*, 15 Ill. 148; *Jones v. Jones*, 16 Ill. 117; *Stribling v. Ross*, 16 Ill. 122; *McClure v. Englehard*, 17 Ill. 47; *Reichert v. McClure*, 23 Ill. 516; *Massey v. Westcott*, 40 Ill. 160; *McFadden v. Worthington*, 45 Ill. 362; *Huebsch v. Scheel*, 81 Ill. 281; *Cushing v. Hurd*, 4 Pick. 252.

Messrs. STEVENS, LEE & GALLAGHER, for defendants in error; that no notice of attachment was mailed, and the court had no jurisdiction, cited *Thormeyer v. Sisson*, 83 Ill. 188.

It was proper to try the case upon the interpleader of defendant, no defense being made for H. T. Ford: *Williams v. Van Mettre*, 19 Ill. 293; *City Ins. Co. v. Commercial Bank*, 68 Ill. 348.

An attachment can operate only upon the interest of the defendant in attachment existing at the time the writ is levied: *Drake on Attachment*, § 220; *Cox v. Milner*, 23 Ill. 476; *Samuel v. Agnew*, 80 Ill. 555; *Seavey v. Browning*, 18 Iowa. 246; *Reed v. Ownby*, 44 Mo. 204.

LELAND, J. *Martin Clayburg, Morris Einstein, David Lindauer, and Bernhard Kuppenheimer*, using the firm name of Clayburg, Einstein & Co., sued out a writ of attachment against Henry T. Ford, as defendant in attachment. As there was an appearance by the defendant, and a declaration by plaintiffs, in which the full names of the members of the firm were given, the irregularity of proceeding in the firm name may have become unimportant. See, on this subject, *Day v. Cushman et al.*, 1 Scam. 475; 1 Chitty Pl. 7th Ed. p. 256, note 1. We are not disposed to consider the irregularity one which would make

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the writ void, even though it might have been sufficient to quash it, if not amended, or to reverse an error if there had been a default. There is, however, no cross-error assigned.

The attachment was levied upon some real estate, and appellee, Susan J. Ford, filed an interpleader under section 29, p. 157, Rev. Stat. 1874. She does not state whether she was seized in fee, or for life, but merely says she was the owner when the land was attached. Although the indications are, as stated by Justice Scott, in *City Ins. Co. v. Com. Bank*, 68 Ill. 348, very strong that this section only applies to personal estate, it was nevertheless held in that case, upon the authority of *Williams v. Van Metre*, 19 Ill. 293, to include real estate. If under this issue the interpleader should prove that she had a life estate, and defendant in attachment the remainder expectant, it might be somewhat perplexing to know what the verdict and judgment should be, or of what use the trial would be.

There is no dispute about the facts. Defendant in attachment made a deed to appellee in Kansas, which was dated, acknowledged and delivered September 12th, 1876. It was sent to Peoria, and was filed for record there Sept. 14th, 1876, at two o'clock, P. M. The writ of attachment was levied on the same day, and the certificate of levy was filed for record under Sec. 9, p. 154, Rev. Stat. 1874, at eleven o'clock A. M. of that day.

There is no evidence that plaintiffs in attachment had actual or constructive notice of the existence of the deed. It is said that because Cratty, the attorney for plaintiff made affidavit on September 14th, 1876, that defendant had within two years last past fraudulently conveyed or assigned his effects, or a part thereof, so as to hinder and delay his creditors and the plaintiffs, that therefore plaintiffs had notice of a deed which was not fraudulent. We are not disposed to consider that a mere general swearing of this kind, according to the form of the statute in such case made and provided, by an attorney, would indicate that plaintiffs knew of the existence of a deed valid as to creditors if recorded in time. See section 1, p. 152, Rev. 1874. This portion of the affidavit was entirely unnecessary. The first clause, that defendant was a non-resident, was enough. The object of mailing the notice to the

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defendant, as mentioned in *Thormeyer v. Sisson*, 83 Ill. 188, being to enable defendant to appear and defend, and as he did do so, the omission is of no moment. Nor is it a question in which appellee has any interest. Conceding that the deed was made for a valuable consideration, to-wit: the discharge of a prior indebtedness, and that there was no motive to hinder and delay creditors—nothing but fair and honest motives—whatever the law may be elsewhere, the levy of the attachment being prior in time, is stronger in right, under the laws of this State in relation to recording instruments concerning real estate. *Jones v. Jones*, 16 Ill. 117; *Martin v. Dryden*, 1 Gilm. 187, and many subsequent cases.

It being inaccurately but positively stated in the brief of appellee that the writ was levied after the deed was recorded, there may have been misapprehension as to dates on the trial below. The question seems to us not to be a debatable one, and therefore the judgment is reversed and the cause remanded.

Reversed and remanded.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

v.

ELEANOR E. COLWELL, Adm'x.

1. NEGLIGENCE—COMPARATIVE—RULE AS TO.—Notwithstanding the party injured may have been guilty of only slight negligence, if that of the defendant, in comparison, amounts to gross carelessness, the plaintiff would not be debarred from recovery; but if the person injured failed at the time to use that care which a man of ordinary prudence would have exercised under like circumstances, then no recovery can be had, unless the negligence of the defendant was so gross as to amount to a wanton or willful wrong.

2. NEGLIGENCE IN SEEKING UNSAFE POSITION—INSTRUCTION.—An instruction which tells the jury that if the deceased, at the time of the injury was exercising ordinary care and prudence, etc., then he is entitled to recover, is erroneous, because it ignores the fact whether the deceased exercised ordinary care in venturing upon a prohibited and dangerous place in the first instance.

3	545
44	180
3	545
51	631

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APPEAL from the Circuit Court of LaSalle county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

Mr. E. N. LEWIS, Mr. C. F. HOBERT and Mr. H. F. GILBERT, for appellant; that where there is no contest as to the facts, a verdict that is manifestly against the evidence will be set aside, cited *Lewis v. B. & O. R. R. Co.* 38 Md. 588; *Bannon v. B. & O. R. R. Co.* 24 Md. 108.

As to the result of a violation of the company's regulations: *B. & O. R. R. Co. v. The State*, 30 Md. 47.

A railroad company is not bound to anticipate extraordinary travel: *Quinn v. Ill. Cent. R. R. Co.* 51 Ill. 495.

The deceased not being in a proper place for passengers, no recovery can be had, even though the train had been grossly mismanaged: *Willis v. Long Island R. R. Co.* 32 Barb. 399; *P. & R. I. R. R. Co. v. Lane*, 83 Ill. 448.

The opinion of an expert must be predicated upon facts proved or admitted: *Rouch v. Zehring*, 59 Pa. St. 74.

Mr. D. P. JONES, for appellee; that even though both parties were negligent, if that of appellant was wanton or willful, a recovery can be had, cited *C. & A. R. R. Co. v. Gretzner*, 46 Ill. 74; *I. & St. L. R. R. Co. v. Stables*, 62 Ill. 313; *T. W. & W. R. R. Co. v. O'Connor*, 77 Ill. 391; *I. & St. L. R. R. Co. v. Galbreath*, 63 Ill. 436.

Appellant was bound to do all that human care and foresight could reasonably do under the circumstances to secure a safe conveyance to deceased: *Fuller v. Talbott*, 23 Ill. 357; *P. C. & St. L. R. R. Co. v. Thompson*, 56 Ill. 138; *Ind., etc. R. R. Co. v. Horst*, 3 Otto, 276; *C. & A. R. R. Co. v. Engle*, 84 Ill. 398.

It is not necessarily negligence for a passenger to ride upon the platform of a car: *Shearman & Redfield on Negligence*, § 284.

Questions of negligence are facts to be determined solely by the jury: *G. & C. U. R. R. Co. v. Yarwood*, 15 Ill. 468; *I. & St. L. R. R. Co. v. Stables*, 62 Ill. 313.

SIBLEY, J. The declaration in this case contains several counts, charging that the appellant was a common carrier of freight and passengers between Streator and Ottawa, in the county of La Salle. That in October, 1876, James N. Colwell took passage at Streator on one of the railroad company's freight trains, to which was attached a car for passengers, and that while temporarily standing on the platform of the passenger car, was, by the negligence of the employees of the company, suddenly jerked off and killed.

The train appears to have been loaded principally with coal, and in starting out from Streator, the switch-engine coupled on to the rear of the train, and pushed at it for several hundred feet, until near the summit of the grade, which arose at the rate of about thirty-three feet to the mile, when it was detached without any warning to the passengers on the platform, and the forward engine, in taking up the slack occasioned by the pushing of the one in the rear, after it became uncoupled from the train, produced, as was not an unusual occurrence, a considerable jerking movement, sufficient to throw Colwell off from the platform of the car, where he was standing with his back against the wheel of the brake, smoking a cigar, and was run over by the engine in the rear of the train.

On the trial of the cause in the Circuit Court of La Salle county, the jury found the defendant guilty, and assessed the damages in favor of the plaintiff, Eleanor E. Colwell, administratrix, etc., at \$3,500.

The defendant appealed to this court, and has assigned several errors for reversing the judgment of the court below.

The main issue on the trial was a question of fact, involving the negligence of the opposite parties, that contributed to the accident. For there is very little doubt that Colwell was guilty of some negligence in taking a position on the platform of the car, and remaining there while the train was in motion drawn and pushed up the steep grade, liable at any moment to be suddenly jerked by either the forward or rear engine. There was room in the car, either standing or sitting, and cards were put up in a conspicuous place notifying passengers against standing on the platform. Yet it appears that he continued

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there, for the reason that he desired to finish his smoking. Nor do we wish to intimate that the jury, under the circumstances of the case, would not have been justified in finding that the employees of the company failed to exercise all the care required of them. The rule, as we understand it, is notwithstanding the party injured may have been guilty of only slight negligence, if that of the defendant in comparison amounted to gross carelessness, the plaintiff would not be debarred from a right of recovery. But if the person injured failed at the time to use the care which a man of ordinary prudence would have exercised under like circumstances, then no recovery can be had, unless the negligence of the defendant was so gross as to amount to a wanton or willful wrong. We had occasion to refer to some of the authorities upon this subject in the case of the Town of Earlville v. Joel Carter, decided at the June term of this court, 1878 (2 Bradwell, 34), and do not feel disposed to reconsider that question.

As the case must go to another jury, it is not thought proper to express any opinion upon the weight of evidence in respect to the comparative negligence of the parties at the time of the accident. But the testimony being of such a character as to require the most accurate instructions upon the law of the case, as has been repeatedly held, we shall confine our attention to that subject alone.

The first instruction given for the plaintiff was as follows:

1. "If the jury believe, from the evidence, that James N. Colwell was a passenger from Streator to Ottawa, upon a passenger car attached by the defendant to the rear of its freight train, for the purpose of carrying passengers; and if they further believe, from the evidence, that while said train was proceeding with said Colwell as such passenger thereon, on its way from Streator to Ottawa, the employees of defendant in charge of said train negligently and carelessly caused the same to be so suddenly and violently jerked as to cause the said Colwell to be thrown from the rear platform of said passenger car, where he was standing at the time, to the ground, and to be run over and killed by the locomotive of the defendant following said train; and if they further believe, from the evidence, that the

said Colwell was not guilty of negligence, but was exercising ordinary care and prudence at the time he was thrown from said platform, and that his death was caused solely by the negligence and carelessness of the defendant's employees in charge of said train in running and managing the same, then the plaintiff is entitled to recover."

This says to the jury, in substance, that if Colwell was exercising ordinary care at the time he was thrown from the platform, then, provided the defendant's negligence contributed to produce the injury, the plaintiff was entitled to recover; ignoring entirely the fact whether the deceased exercised ordinary care in venturing upon that prohibited place in the first instance. What he did after he ventured there might have been one thing, and the act of placing himself in that locality quite another; and the instruction, as held in the *C. B. & Q. R. R. Co. v. Sykes*, 1 Bradwell, 520, was erroneous. One of the main questions in the case was, whether a man of ordinary prudence would have placed himself upon the platform at all—not necessarily how he demeaned himself after having voluntarily exposed himself to the dangerous position.

The 8th instruction, in these words:

8. "Even if the jury should believe, from the evidence, that James N. Colwell was guilty of negligence in standing upon the rear platform of the passenger car attached to the rear end of the freight train, while said train was in motion, yet if they further believe, from the evidence, that defendant attached said passenger car to said freight train for the purpose of carrying passengers, and that said Colwell was a passenger thereon; and if they further believe, from the evidence, that the defendant's employees in charge of said train, and of the locomotive following it, negligently and carelessly caused said train to be so suddenly and violently jerked that said Colwell was thereby thrown from the platform of said passenger car to the ground, and immediately run over and killed by said locomotive; and if they further believe, from the evidence, that such negligence and carelessness of defendant's employees was gross when compared with the negligence of said James N. Colwell, the jury should find for the plaintiff," does not give a correct exposition

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of the law, since it contains the general proposition that even though the jury believe, from the evidence, that Colwell was guilty of negligence in standing upon the platform of the car, etc., yet if it further appeared that the defendant's employees were guilty of gross negligence when compared with the negligence of Colwell, the jury should find for the plaintiff. The question arises, what was the comparison meant to be drawn? The degree of negligence that Colwell might have been guilty of is entirely omitted. Suppose he was guilty of more than slight negligence, or even of great recklessness, and the defendant was also guilty of gross carelessness. Then both would have comparatively been guilty in an almost equal degree. But under such a state of facts the plaintiff certainly could not have recovered, for the law does not recognize the grading of comparisons down to such a fine distinction. It is only where the comparison is between slight on the one hand, and gross on the other, that a recovery is allowable; and this important qualification is wholly omitted in the instruction.

Judgment reversed and cause remanded.

Reversed and remanded.

DAVID S. PATTERSON

v.

NELSON SWEET, Adm'r.

1. **DEED—CONVEYING RIGHT OF FLOWAGE.**—A deed of a right to flow land is not a mere license revocable by the grantor. Nothing short of a conveyance or non-user for twenty years would destroy the effect of the deed, so that the land would revert to the grantor.

2. **FORECLOSURE OF MORTGAGE—COVENANT AGAINST INCUMBRANCES.**—Where the owner of land granted by deed the right to flow the land, and subsequently conveyed to another the title in fee of such land, receiving back a mortgage to secure the deferred payments, forecloses such mortgage for non-payment of certain of the notes, his grantee, the defendant in such foreclosure, may have the amount of damages sustained by him by reason of such flowage, applied in reduction of the notes due and subsequently maturing. Such an easement constitutes a breach of the covenant against incumbrances, and is a proper defense to the notes.

3	550
47	235
3	550
77	538

ERROR to the Circuit Court of Ogle county; the Hon. W. W. HEATON, Judge, presiding. Opinion filed May 2, 1879.

Messrs. DIXON & BETHEA, for plaintiff in error; that the deed to plaintiff in error having full covenants, the existence of the right to flow the land was a breach of the covenant against incumbrances, cited *Hawk v. McCulloch*, 20 Ill. 223; *Brady v. Surck*, 27 Ill. 479; *Moore v. Vail*, 17 Ill. 185; *Baker v. Hunt*, 40 Ill. 264; *Hubbard v. Norton*, 10 Conn. 431; *Kellogg v. Ingersoll*, 2 Mass. 97; *Mitchell v. Hozen*, 4 Conn. 494; *Pollard v. Dwight*, 4 Cranch, 430; *Beach v. Miller*, 51 Ill. 206; *Rawle on Covenants for title*, 140.

The easement was never abandoned, and there was no non-user for twenty years: *Washburn on Easements*, 547.

The measure of damages is the diminished value of the property, and the amount may be retained from the purchase money: *Batchelder v. Surgis*, 3 Cush. 201; *Harlow v. Thomas*, 15 Pick. 66; *Wilson v. Cochran*, 45 Penn. 270; *Alton v. Ill. Trans. Co.* 12 Ill. 38; 3 *Washburn on Real Property*, *674.

The remedy was by cross-bill: *Hilliard on Injunctions*, 305.

The cause having been heard by Judge Heaton, the decree could only have been entered by him. A decree is inchoate until approved and filed for record: *Hugh v. Washington*, 65 Ill. 245; *Hoey v. McFarlane*, 4 C. B. 718.

The right by deed to flow the land was an easement: *Angell on Watercourses*, § 141; *Washburn on Easements*, 150; 2 *Washburn on Real Property*, 349; *Woolrych on Waters*, 153; *Stirling Hydraulic Co. v. Williams*, 66 Ill. 393; *Gebhardt v. Reeves*, 75 Ill. 301.

Even if it is a license, it is coupled with an interest, and therefore not revocable: *Woodward v. Seeley*, 11 Ill. 157; *Kamphouse v. Gaffer*, 73 Ill. 453.

The owner of the dam had a right to repair and re-build: *French v. Braintree Mfg. Co.* 23 Pick. 216; *Benham v. Miner*, 38 Conn. 252; *Winham v. McGuire*, 51 Ga. 578; *Jaqui v. Johnson*, 27 N. J. Eq. 526; *Angell on Watercourses*, § 149.

Waiver of forfeiture of easement may be inferred from the failure to assert it, and permitting the grantee to make valuable

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improvements after condition broken: *Kenner v. Am. Contr. Co.* 9 Bush. 202; *Guild v. Richards*, 16 Gray, 309.

Possession of the easement is *prima facie* evidence of title: *C. & St. L. R. R. Co. v. Woolsey*, 85 Ill. 370; *Browne on Statute of Frauds*, 236.

A party having an absolute contract of sale of land, is the equitable owner, and may incumber it: *Lombard v. Sinai Cong.* 64 Ill. 477.

When a party having the equitable title conveys by quit-claim deed, and subsequently acquires the legal title, it will inure to his grantee: *Welch v. Dutton*, 79 Ill. 465; *Morgan v. Clayton*, 61 Ill. 35.

Mr. E. F. BULL and Mr. M. D. SWIFT, for defendant in error; that the easement created was only a license, cited *Woodward v. Seeley*, 11 Ill. 157; *Kamphous v. Gaffner*, 73 Ill. 453; *Huck v. Flentye*, 80 Ill. 258.

A simple grant or release does not pass after acquired title: *Frink v. Darst*, 14 Ill. 304; *Phelps v. Kellogg*, 15 Ill. 131.

LELAND, J. The facts in this case chronologically stated, are as follows, as to the title to the land:

On and before September 25, 1860, The Illinois Central Railroad Co. owned the land in relation to which the controversy arises, viz: the northeast quarter of section 36, T. 23, R. 7, etc. On the 25th a contract of sale was made by the company to Garner Sweet, who was to have a conveyance upon making certain payments. On the 26th day of September, 1860, Garner Sweet executed a conveyance to Joel Sanford, by which he remised, released and quit-claimed his interest in and to a part of the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 36, town 23, range 7; that is to say, so much of said west-half as lies on Buffalo creek, at the upper or north end of Joel Sanford's mill-dam, situated on the N. E. $\frac{1}{4}$ of section 1, town 23, range 7, and so much of said west half as may be necessary for said Sanford to flow back the water of said dam, when said dam is raised fifteen feet at the bulk-head. It is fully understood that this quit-claim deed extends no further than the use of said land

for the said purpose of flowing the water of said dam, as above described; and further, if at any time the said dam is removed, or shall cease to be used as a dam, then and in that case the said land reverts to the party of the first part, their heirs, assigns, executors or administrators, to have and to hold, etc. in usual form.

The Railroad Co. made a deed to Sweet December 5, 1867. On May 1st, 1869, Garner Sweet, for a consideration of \$7,425, conveyed by full covenant warranty deed the above quarter section, and a parcel of land on section twenty-four, described by metes and bounds, to plaintiff in error, Patterson, who paid \$3,000 down, and gave notes and mortgage on the same land for \$4,425. There was a mistake in description as to the range, which was afterwards corrected.

There were nine notes secured by the mortgage, and there was a bill filed by the administrator of Sweet, to foreclose and sell for a note due May 1st, 1875, for \$500, with interest at ten per cent., upon which two years' interest only had been paid. The notes maturing before this one had been sold and transferred, and there had been a foreclosure and sale of some portion of the mortgaged premises. The notes maturing after this one still belonged to the estate of the deceased. There was a cross-bill by Patterson. The defense to the note in suit was the breach of the covenant against incumbrances, in the deed from deceased to Patterson, because of the deed of September 26th, 1860, from the deceased to Joel Sanford, of the right of flowage; and in the cross-bill it was claimed that the amount of the damages sustained by Patterson, if more than the amount due on the \$500 note, should be applied to subsequently maturing ones, and that they should be canceled, and surrendered, etc.; and it was also claimed that the damages were more than the amount of all the notes belonging to the estate.

Although it was proved beyond dispute that the land was flowed and damaged to considerable extent, there was no deduction made by the court below, but there was a decree for the amount of principal and interest due on the note, and for a sale of the land.

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The case was tried before the late Judge Heaton, who died without having rendered a decree. The decree was by Judge Bailey, and it is insisted, that as he did not hear the evidence, ~~he~~ could not render a decree.

As the question thus presented is not material, we do not deem it necessary to investigate it. We think the decree erroneous upon the evidence in the record, and that there should be a reversal for that reason.

As the case seems to us to be one where it is plain there should have been some allowance to Patterson for his damages by reason of the alleged breach of covenant, the case must be remanded to have the amount ascertained. Appellee's counsel claim that the quit-claim deed from Sweet to Sanford was a mere revocable license, and in support of the position cite Woodward v. Seely, 11 Ill. 157, and Kamphouse et al. v. Gaffner, 73 Ill. 453. These cases do not decide that a deed of a right to flow land is revocable by the grantor, but are to the contrary effect. They decide merely that if there were no deed, but merely a parol grant of such a right, it might be invalid under the Statute of Frauds. That such an easement can be conveyed by deed, is settled law, requiring no authority to be cited in support of it. Angell on Watercourses, Chap. V., 6th edition.

There is no force in the position that the dam has been removed, or has ceased to be used as such. The dam went out partially as dams often do, and it was rebuilt again as is not uncommon; but there has been no such removal of the dam, or ceasing to use it, as amounted under the deed of the easement to an abandonment of it, so that it would revert to the grantor. Nothing short of a reconveyance or non-user for twenty years would have this effect.

We think the construction that the right to flow was only by that particular dam, and that no right to repair if injured, or to rebuild if carried out by the next spring freshet, existed in the grantee under the deed, is incorrect and not reasonable. We look upon it, though rather rudely expressed, as an ordinary conveyance of a right of flowage by a dam fifteen feet high at the bulk-head, commonly called a dam with a head and fall

of fifteen feet, to continue perpetually unless there was that kind of an abandonment mentioned above, or some distinct indication that the grantee had permanently given up the right to the easement. The case of *Huck v. Flentye*, 80 Ill. 259, **about the party wall**, is not in point according to our construction of the deed in this case. On the subject of the right to repair and rebuild, etc., see *French v. Braintree Manufacturing Co.* 23 Pick. 216; *Windham v. McGuire*, 51 Georgia, 578, and cases cited; *Benham v. Miner*, 38 Conn. 252. As to abandonment by non-user, see *Angell on Water Courses*, 6 Ed. Sec. 252, and notes. See, also, sections 149 and 248. *Jaqui v. Johnson*, 27 N. J. Eq. 526; *Washburn on Easements*, etc., p. 447 to 557.

The easement in Sanford and his grantees constituted a breach of the covenant against incumbrances, and if so it was a proper defense as to this note, and if the damages exceeded the amount of it, relief by cross-bill as to the subsequently maturing notes was proper. *Morgan v. Smith*, 11 Ill. 194; *Beach v. Miller*, 51 Ill. 206; *Jenny v. Heminway*, 53 Ill. 97; 3 Wash. Real. Prop. 674, marg. p. 3d Ed.; *Bachelor v. Sturgis*, 3 Cush. 201; *Harlow v. Thomas*, 15 Pick. 66; *Rawle on Covenants*, etc., 140 and 344.

The answer to the point made that Garner Sweet had no title when he conveyed the easement to Sanford, and that such conveyance was not sufficient to pass a title subsequently acquired, is that by the contract with the railroad company he had an equitable one, and that when one has such title and makes a quit-claim deed, the subsequently acquired title conveyed under the contract does inure to the benefit of the grantee in the quit-claim deed. *Welch v. Dutton*, 79 Ill. 465.

Such equitable owner may encumber the land in equity as though he had the legal title. *Lombard v. The Chicago Sinai Congregation*, 64 Ill. 477.

It is unnecessary to say more. There should have been an allowance to plaintiff in error, to be deducted from the note in suit, and if large enough, from those not sued also, of such damages as would be recovered in an action of covenant for the breach of the covenant against incumbrances not capable of being removed. We have been much aided by the thorough

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examination counsel have given this case. We desire, however, to say to counsel for plaintiff in error, and to attorneys generally, that care in correcting the proof-sheets of of their printed briefs is of much importance. There are many typographical errors in the otherwise excellent brief of plaintiff in error as to the figures indicating volume and page, and some references we did not find at all. Among the liberal supply of authorities furnished in this case, however, we found all that were necessary to satisfy us that the decree ought to be reversed and the cause remanded.

Reversed and remanded.

ISAAC VAN TUYL
v.
LEWIS RINER ET AL.

1. SLANDER OF TITLE.—An action of slander of title may be sustained where the slander is false and malicious, and where special damage results from speaking the slanderous words, such as preventing the sale or leasing of the land. And where the action is against one interested in the title, if the motive for speaking the words be not reasonable self-protection, but malice, without probable cause, there may be a recovery.

2. PUNITIVE DAMAGES.—In actions of this nature there may be evidence of such a wanton, willful and malicious attempt to injure the owner of the land, as will justify the finding of exemplary or punitive damages, but the present case is not one, from the evidence, calling for anything more than compensatory damages.

APPEAL from the Circuit Court of Warren county; the Hon. GEO. W. PLEASANTS, Judge, presiding. Opinion filed May 2, 1879.

Messrs. STEWART, PHELPS & GRIER, for appellant; that the burden of proving malice is upon the plaintiff, cited Wright v. Woodgate, 2 Cr. M. & R. 573; Cockayne v. Hodgkisson, 5 Car. & P. 543; Pitt v. Donovan, 1 Maule, & S. 639.

Proof must be made of damage actually sustained: Starkie

on Slander, 192; Townshend on Slander, 309; Kendall v. Stone, 1 Seld. 14; Bailey v. Dean, 5 Barb. 297.

The damages are excessive: Pitt v. Donovan, 1 Maule & S. 639; Elborow v. Allen, 3 Cro. Jac.; Law v. Harwood, 4 Cro. Car.; Gerrard v. Dickenson, Cro. Eliz. 197; Am. Lead. Cas. 105.

Instructions should state the law correctly, and each instruction should be correct in itself: Grube v. Nichols, 36 Ill. 92; C. B. & Q. R. R. Co. v. Payne, 49 Ill. 499; C. & A. R. R. Co. v. Murray, 62 Ill. 326; Baldwin v. Killian, 63 Ill. 550.

Vindictive damages should not be allowed: 2 Greenleaf on Ev. § 253; Chicago v. Martin, 49 Ill. 241.

Messrs. KIRKPATRICK & HANNA, for appellees; upon the question of privileged communications, cited White v. Nichols, 3 How. 266.

Falsehood and the want of probable cause will amount to proof of malice: White v. Nichols, 3 How. 266; Pitt v. Donovan, 1 Maule & S. 639; Gerard v. Dickenson, 4 Rep. 18; Cockayne v. Hodgkisson, 5 C. & P. 543; Like v. McKinstry, 41 Barb. 186; Townshend on Slander, § 206; Addison on Torts, § 1137; Chapman v. Cawrey, 50 Ill. 512; 1 Am. Lead. Cas. 128.

Re-assertion of the charges, by pleas, with no attempt to prove their truth, is evidence of malice: Beasley v. Meigs, 16 Ill. 139; Spencer v. McMasters, 16 Ill. 405.

Justification must be co-extensive with the slander: Sanford v. Gaddis, 13 Ill. 329; Darling v. Barks, 14 Ill. 46.

If claiming to act under advice of counsel, defendant must show that he fully and fairly stated to counsel all the facts: Ross v. Innis, 35 Ill. 487; Anderson v. Friend, 71 Ill. 475.

Acting under advice of counsel is no shield, but a circumstance to be considered in determining the question of malice: Townshend on Slander, § 206; Like v. McKinstry, 41 Barb. 189; Jasper v. Purnell, 67 Ill. 358.

Upon the question of damages: Starkie on Slander, 192; Kendall v. Stone 5 N. Y. 14; Townshend on Slander, § 206; Stark v. Chetwood, 5 Kan. 141; Paull v. Halferty, 63 Pa. St. 46.

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The verdict will not be set aside for excessive damages unless they are so great as to lead to the belief that the jury were misled by passion or prejudice: *Schlencker v. Risley*, 3 Scam. 483; *McNamara v. King*, 2 Gilm. 432; *Ross v. Innis*, 35 Ill. 487; *Ill. Cent. R. R. Co. v. Simmons*, 38 Ill. 242; *Drohn v. Brewer*, 77 Ill. 280; *Spencer v. McMasters*, 16 Ill. 405; *Kendall v. Stone*, 2 Sandf. 269.

Courts will not reverse for trivial errors: *Smith v. Binder*, 75 Ill. 492; *Nichols v. Mercer*, 44 Ill. 250; *Rice v. Brown*, 77 Ill. 549; *Sterling Bridge Co. v. Baker*, 75 Ill. 139; *Stowell v. Beagle*, 79 Ill. 525; *T. P. & W. R. R. Co. v. Ingraham*, 77 Ill. 309; *Durham v. Goodwin*, 54 Ill. 469; *Town of Vinegar Hill v. Busson*, 42 Ill. 45; *N. L. Packet Co. v. Binninger*, 70 Ill. 571; *Walker v. Collier*, 37 Ill. 362; *Murphy v. The People*, 37 Ill. 447.

Upon the question of a right to exemplary damages: *Roth v. Smith*, 54 Ill. 431; *Donnelly v. Harris*, 41 Ill. 126; *Kendall v. Stone*, 2 Sandf. 269; *Sedgwick on Damages*, 454; *Field on Damages*, § 25; *Grabb v. Margrave*, 3 Scam. 372; *I. & St. L. R. R. Co. v. Cobb*, 68 Ill. 53; *Dobbins v. Duguid*, 65 Ill. 464; *Stillwell v. Barnett*, 60 Ill. 210; *C. & I. R. R. Co. v. Baker*, 72 Ill. 316; *Cutler v. Smith*, 57 Ill. 252; *Farwell v. Warren*, 51 Ill. 467; *Smalley v. Smalley*, 81 Ill. 70; *Becker v. Dupree*, 75 Ill. 167; *Johnson v. Camp*, 51 Ill. 219; *Best v. Allen*, 30 Ill. 30; *Onsly v. Hardin*, 23 Ill. 403; *Bull v. Griswold*, 19 Ill. 631; *Sherman v. Dutch*, 16 Ill. 283; *Oard v. Oard*, 59 Ill. 46.

LELAND, J. This was an action brought by appellees against appellant for slandering the title to eighty acres of land of appellees, situated in Warren county.

Actions of this kind have rarely if ever been brought in this State, perhaps because a great deal of latitude of discussion of such subjects has been practiced and tolerated.

Without doubt, however, such an action may be sustained, where the slander is false and malicious, and where special damage results from speaking the slanderous words, such as preventing the selling or leasing the land, etc., usually,

however, against a stranger, who has no interest in the title, because of the difficulty of making out a merely malicious motive in one who has an interest to protect by discussion of the question of title. If the motive, however, be not reasonable self-protection, but malice, without probable cause for speaking the words, there might be a recovery against one interested in the title.

Mrs. Lewis Riner and Mrs. Isaac Van Tuyl were sisters. Their father, Asher Davis, who was eighty-one years old in August, 1878, had in February, 1873, conveyed the alleged slandered land to Mr. and Mrs. Riner, and they had executed a contract to support Davis and his wife, who were both old and feeble, during their lives, and to bury them when dead, and this contract was the consideration for the deed.

It also appeared, however, that Davis had three daughters and three eighty-acre tracts of land; two of the daughters in this State and one in Ohio, and two of the tracts of land in Iowa, and one in this State. He conveyed one of the Iowa tracts to the Ohio daughter, Mrs Bell; the other, at the request of Mrs. Van Tuyl, to her son by a former husband, Asher D. Shauman, and the Illinois tract, which was the most valuable, to Mr. and Mrs. Riner, and they were to support and bury the old gentleman and his wife, as before stated.

This too often resorted to contrivance to save trouble, as is usual, made more instead of less, and among others came this unpleasant family law-suit.

Riner and wife desired to sell the land and go to Kansas, and the old gentleman, whose testimony does not seem to indicate any weakness of intellect, said: "I am alone. My wife is dead, and I am satisfied that I am just as near heaven in Kansas as I am here, and it don't make any difference where this old body lies when I am dead. Sell out and go, and I will go with you." And thereupon, with the full consent of Davis, Riner and wife, in April or May, 1877, entered into negotiation with Peter Staley, and a verbal offer was made by the latter to pay \$3,800 cash on Sept. 1st, 1877, or \$1,800 then, and \$2,000 March 1st, next, with interest at ten per cent. On September 1st a deed was tendered, and Staley declined to take it and

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pay the money, as he says, because Van Tuyl told him in August that his wife was legal heir to that piece of land; also Mrs. Bell of Ohio was another heir, and that if he bought he would buy a law-suit; that Mr. Davis was not capable of doing business; that Mr. Davis had not been capable of doing business for a good many years; said he supposed Riner had a deed, but if he had a deed, had just got it from Mr. Davis some way, and he could go in and talk to Davis and he would make him a deed in some way; said old man was not at himself, and had not been for a great many years; was not capable of doing business. Asked him if he would swear Davis wasn't at himself. Said he would, and his wife would, and Isaac Shauman and his wife would, and he could get a hundred witnesses in this State and Ohio that would swear the old man not capable of doing business; said he was fearful if Riner and wife sold the land, the old man would be thrown on public charity; said he heard they were some in debt, and was afraid if they went off and spent what they had, old gentleman might come back on him to keep. Said if Riner sold out and went west would probably spend all of it, and was good deal in debt, and old man would come on him for support. Said for his part he would not move, but said his wife would not give him rest day or night, till he came to see me. Said one reason why he did not want me to buy was, that Riner might spend what he had got from the old man, and the old man would be deprived of his support, and would have to come on him. Shauman told me old man had right to support off that land. May have told me he would see the old man had his rights. Shauman did a good deal of talking. Might have said that, can't tell; can't recollect that he said that. Think he said something about the old man's support.

I proposed to take the land at same price if they would make deed good. Told Van Tuyl I would have nothing to do with it unless he and Riner would settle the thing up. Expect I would have taken it if he (Riner) had made me good deed. He said it could not be settled up, I believe. This and other evidence as to the speaking the words in the declaration, and also evidence as to the extent of the damage to the plaintiff because of the failure to sell to Staley, and on the subject of the defendants'

motives being malicious, and of his intent being to enable his son-in-law and himself to sell an eighty-acre tract to Staley, as they did do, instead of plaintiff's doing so, and to enable his wife to share in the land as heir, etc., constituted plaintiff's case.

There was evidence on the part of the defense tending to show that the motives for speaking the words were not malicious, but honest and without malice, and that the damage, if any, by reason of not completing the sale to Staley, was trifling. The jury found for plaintiffs, and their verdict was as follows:

"We, the jury, find the issue for the plaintiffs, and assess the damages on the land at one thousand dollars, and exemplary damages at five hundred dollars; total, fifteen hundred dollars." As to such a verdict being proper, see Sedgwick on the Measure of Damages, p. 573, note, and p. 744, note, top paging, 6th Ed. The court, however, considering the verdict informal, caused it to be put in the following form: "We, the jury, find the issue in favor of plaintiffs, and assess the damages at fifteen hundred dollars." We are not disposed to say that upon the evidence there ought not to have been a verdict in this case for the plaintiffs, nor would we be inclined to disturb it if it had been for the defendant.

As to whether defendant and his wife honestly feared that if the land was once converted into money, the latter "might take unto itself wings and fly away," and the old father be made to suffer because of the inability of Riner and wife to take care of him, or whether this interference with the sale was from selfish, dishonest and malicious motives, was a question for the jury to determine.

Although in the verdict as reduced to form, the compensatory and punitive damages were merged and consolidated in the one actually rendered by the jury, they were as we have seen, separated. The one thousand dollars compensatory damages, for preventing this sale to Staley, seems to us unreasonably large. We think that the advantage which appellees had obtained over Staley, in their trade with him, has been overestimated, and that the injurious consequences of a statement, the accuracy or inaccuracy of which could readily be ascertained

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by Staley, has been much magnified. The only real questions of fact were, whether Davis, in February, 1873, had sufficient mental capacity to make a deed, and whether in September, 1877, he had mind enough to consent that appellees might sell the land. It is rather difficult under the circumstances to come to the conclusion that the spoken words prevented Staley from purchasing, when by the Statute of Frauds he was not legally compelled to; if he had really made a bad bargain with appellees, and when he had the means of as readily ascertaining whether the statement of Van Tuyl was accurate or not, as he would if he had told him the land was full of rocks, or had on it many creeks and sloughs, etc. If this verdict had been for reasonable compensatory damages only, we might say that verdicts should not be interfered with except in clear cases of an indication that there was passion, prejudice, or other improper influence operating upon the jury, and that the power to do so should be sparingly used. While we are disposed to concede that in a case of slander to the title to real estate, there may be evidence of that wanton, willful and malicious attempt to injure the owner of the land, which would justify punitive or exemplary damages (*Kendall v. Stone*, 2 Sandf. N. Y. 269, cited approvingly by Sedgwick in his work on the *Measure of Damages*, 6th Ed. p. 679), we do not think this case one for anything more than just and reasonable compensation. Counsel for appellee applies to the conduct of appellant the scriptural quotation "She gave me of the tree and I did eat." Though the consequences in that case were fraught with disaster to the man and the woman, the authority is not fairly applicable to the facts in this case. A sick woman might be anxious about the future comfort of her father, and a husband continually importuned to do so by the wife, might be a little earnest in his discourse on such a subject under her promptings, without being punished for it any more than was necessary to fully compensate one whose title to land may have been injured by words thus spoken.

We think the case is one where the jury, under some influence which was not proper, have made their verdict too large. Even if appellant and his wife did not arrive at a just conclu-

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sion as to the fairness of the disposition of the father's estate, this was a question in which they had an interest, and some reasonable latitude of discussion must be allowed to people in defense of their own interests, without their being punished for it. It does not appear that the motive of appellant was to sell his and his son-in-law's land to Staley. This is purely imaginary. Appellant swears that it was not thought of when he spoke the words, and he is not contradicted in this by any one. Without giving a detailed statement of the evidence, we content ourselves with saying that after a careful and thorough consideration of it all, the sum of one thousand dollars actual damage seems quite large, and we think that there should not have been the added punitive damages upon the facts in evidence, but just compensation only, if anything.

The 2nd instruction for plaintiff is erroneous. The jury are therein directed that they should assess the plaintiff's damages at whatever amount the proofs show they are entitled to, together with such exemplary damages as they may think right and proper under all the circumstances in proof. To have made the instruction proper, at least the words "if any" should have followed the words "exemplary damages," or there should have been some equivalent expression. The instruction as given requires the jury to give some punitive damages, leaving the amount only to be fixed as they think right and proper under the facts and circumstances in proof, with no pointing out what facts would make a proper case. Malice is always necessary to maintain the action, and yet it does not follow that because there is this legal malice that therefore there must always be not only the actual, but also vindictive damages, though perhaps there might be. The court has convicted the defendant and left the fine with the jury.

It may be well questioned whether punitive damages ought ever to have been allowed to a plaintiff. *Holmes v. Holmes*, 64 Ill. 294. They certainly are not to be favored, and it should not be assumed, as it is in this instruction, that smart-money or exemplary damages should be allowed. *Collins v. Waters*, 54 Ill. 485. If the law were that jurors should always make the separation made in this case, and that the punitive

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share should go into the public treasury, where it more justly belongs than to the plaintiff, it would look more like justice and reason.

The injurious effect of this instruction is not removed, because in the first and eighth it is said the jury may give exemplary damages, etc. On a subject like this, each instruction should be correct in itself. *C. B. & Q. R. R. Co. v. Payne*, 49 Ill. 499; *Ch. & Alton R. R. Co. v. Murray*, 62 Ill. 326; *Baldwin v. Killian*, 63 Ill. 550.

The following two unnumbered instructions were, to say the least, calculated to mislead and confuse the jury:

First. "The jury are instructed that defendant cannot excuse or justify himself in this case by showing that what he did he did at the urgent request and solicitation of his wife or any other person."

Second. "The jury are instructed that in actions of this kind, if a defendant wishes to justify or excuse himself for words spoken, the justification must be as broad as the charge, Therefore, in this case, if the jury find from the evidence that defendant represented and asserted to said Staley that if he (Staley) bought the land in controversy, he (Staley) would buy a law-suit, and asserted and represented a want of capacity in said Asher Davis in the manner and under the circumstances and for the purpose set forth in either the first or second instruction of plaintiffs, then the jury are instructed that defendant cannot excuse himself by showing 'merely' that he or his wife were fearful that if plaintiffs sold the land described, they might spend or waste the proceeds, and that in consequence said Asher Davis might be thrown upon defendant and his wife for support."

Even if they might be accurate as to the mere question whether plaintiffs should have a verdict or not, a jury would be very likely to consider them as meaning that the facts stated should not be taken into account as an excuse in determining the amount of the verdict. Counsel should have distinctly used such words in them, or the court should at least have so modified them as to clearly convey the idea that the plaintiff would be entitled to a verdict, notwithstanding the facts might

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be as stated, and that they should only be considered in mitigation of exemplary damages. This, however, is not clear as to the last one, because if defendant and his wife were really and honestly fearful that the father might be deprived of the support to which he was entitled under the contract, and be thrown upon the defendant and his wife for support, and that the words were spoken merely for that reason, it is difficult to perceive how there could be a malicious motive to injure, especially if the words were spoken at the urgent request and solicitation of a wife who had such honest fears, to a husband who also honestly entertained them, though there may have been exaggeration in the statement as to the mental capacity of the father. It is enough, however, to say that a jury would not if a lawyer might, understand what was meant by the words "excuse or justify," and would consider themselves instructed that such facts made it no better for appellant, and that they should have no influence as to the amount of their verdict.

We think another jury should pass on the case.

Reversed and remanded.

MURRAY NELSON ET AL.

v.

GEORGE W. RAVENS ET AL.

PAROL AGREEMENT TO PAY A NON-EXISTING BILL.—R. & Son became indebted to N. & Co., and to enable them to go on with their business and pay up this indebtedness, N. & Co. placed a person in charge of the books of R. & Son, and agreed to advance further sums for the purchase of grain, and reimburse themselves, and pay the old indebtedness from the sale of such grain. In furtherance of this agreement, the agent of N. & Co. called upon appellees, who were bankers, informed them of the arrangement with R. & Son, requesting that R. & Son might open an account with appellees, and told them that N. & Co. would honor all bills drawn on them by R. & Son in the regular course of business with N. & Co. Drafts were afterwards drawn by R. & Son, and cashed by appellees to large amounts. N. & Co. refused to honor the drafts in suit, because of the insolvency of R. & Co. *Held*, that the parol promise to pay such drafts when made was valid, and that N. & Co. were liable for the same; that the true measure of damages should be

Messrs. BLANCHARD & BLANCHARD, for appellants; that the credit was not given to N. & Co., and therefore the promise, if any, was collateral and within the Statute of Frauds, cited *Ruggles v. Gatton*, 50 Ill. 412; *Eddy v. Roberts*, 17 Ill. 505; *Putmor v. Haggard*, 78 Ill. 607.

In this case the statute may be relied on under the general issue: *Tyler v. Merrill*, 55 Ill. 52; *Meyers v. Scheimp*, 67 Ill. 469; *Durant v. Rogers*, 71 Ill. 121.

Messrs. RICHOLSON & SNOW, for appellees; that the question at issue was solely one of fact, and the finding should not be disturbed where there is evidence to support it, cited *White v. Clayes*, 32 Ill. 325; *C. & A. R. R. Co. v. Shannon*, 43 Ill. 338; *Harbison v. Shook*, 41 Ill. 142; *First Nat. Bank v. Mansfield*, 48 Ill. 494.

A parol promise to pay an existing or non-existing bill, is not within the Statute of Frauds: *Nelson v. First Nat. Bank*, 48 Ill. 36; *Jones v. Council Bluffs Bank*, 34 Ill. 313; *Mason v. Dousay*, 35 Ill. 424; *Sturges v. Fourth Nat. Bank*, 75 Ill. 595; 2 Greenleaf's Ev. § 104.

PILLSBURY, P. J. Assumpsit upon the common counts for money paid by appellees to E. Rieliardson & Son, upon draft drawn by them upon appellants, which appellants refused to pay.

On the 23d and 25th days of October, 1875, E. Richardson & Son drew the two following drafts upon appellants:

" \$500.00.

Ottawa, Ill., Oct. 23d, 1875.

“At sight, pay to the order of Exchange Bank five hundred dollars, value received, and charge to account of

"No. 70. E. RICHARDSON & SON.

"TO MURRAY NELSON & Co., Chicago, Ill."

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“\$500.00.

Ottawa, Ill., Oct. 25th, 1875.

“At sight, pay to the order of Exchange Bank five hundred dollars, value received, and charge the same to account of

“No. 71.

E. RICHARDSON & SON.

“To MURRAY NELSON & Co., Chicago, Ill.”

These drafts were passed to the credit of the drawers by appellees, who were the proprietors of the Exchange Bank, and the amount thus credited was drawn out by Richardson & Son to the extent of \$680.89, before notice of non-payment of the drafts reached appellees.

Richardson & Son had for a long time been engaged in the buying and shipping grain at Ottawa, Illinois. From the fall of 1874 the appellants had been their commission men at Chicago.

In June, 1875, Richardson & Son became financially involved, and Pickering, of the firm of Murray Nelson & Co., went to Ottawa, and there made a settlement with them, when it was found that they were indebted to appellants in about the sum of \$1,250 dollars, for money advanced them with which to purchase grain. At this time, June 22nd, an agreement was made by appellants and Richardson & Son, by which Richardson & Son would continue in the business of buying grain and shipping the same to appellants; and appellants were to sell the same on account of such prior indebtedness and any future advances, and for the purpose of protecting the interest of Nelson & Co., Richardson & Son were to employ one Dorland, who was to have the exclusive charge of the books, and to furnish Nelson & Co. a statement when required by them to do so, and was to receive and disburse all moneys advanced by Nelson & Co. to Richardson & Son.

On the trial George W. Ravens, one of the plaintiffs, testified that after this contract was made, Pickering came into their bank and told him that Richardson & Son desired him to speak with plaintiffs about opening an account with them; that he told Pickering that the Richardsons were hard up, and that they did not care to take hold of their business unless they could safely do so. That Pickering then informed him that Murray Nelson & Co. were going to furnish money to the Richardsons,

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and would see them all right, as they were going to have one of their men in the office; as long as he was there it would be all right; that Dorland would draw drafts on Nelson & Co., to be signed by the elder Richardson, and Dorland would check out the amounts in the regular course of business, signing checks E. Richardson & Son, by Dorland, and that if the arrangement was broken up he would telegraph to plaintiffs; and that Murray Nelson & Co. would honor all drafts drawn on them as they came in. The witness further testified that from that time to the time the drafts in question were drawn, they received and cashed drafts drawn by Richardson & Son on Nelson & Co. to the amount of \$50,000. That the plaintiffs would not have allowed Richardson & Son to check against such drafts had it not been for the promise of Pickering to honor them when presented.

Pickering as a witness denies he made any arrangement with the plaintiffs as testified to by Ravens; that while they were to furnish money and did pay the drafts presented to them, yet it was done in the usual course of business, and not by agreement with plaintiffs. He says, however, these two drafts would have been paid had not Richardson & Son been closed out by the sheriff levying executions upon the grain then on hand.

These two witnesses were the only ones who testified upon this disputed question of fact.

While it is true that the burden of proof was upon the plaintiffs, upon this proposition we cannot say as a matter of law that the court trying the case in place of the jury was not justified in finding the issue upon this point in favor of the plaintiffs. The court acting as a jury, was peculiarly the judge of the credibility of the witnesses, and many circumstances may occur upon a trial that will give greater weight to one witness than another, that cannot be reproduced upon paper: such as the appearance of the witness upon the stand, his apparent candor and fairness, the degree of intelligence and recollection manifested by him in detailing the facts surrounding a given transaction, and many others that will convince the mind of the court or jury that he is entitled to the greater credit, and of which an Appellate Court is less qualified to judge for want of

equal opportunities of seeing the witnesses and observing all the circumstances surrounding them upon the witness stand. We therefore feel bound to hold that the finding of the court is sustained, that such contract was made as testified to by Ravens.

A parol promise to pay a non-existing bill was held valid by our Supreme Court in *Murray Nelson v. The First National Bank of Chicago*, 48 Ill. 36, a case like the one at bar in all material respects, so far as the facts are concerned, and that such promise is not within the Statute of Frauds. The same doctrine was held in *Sturges v. Fourth National Bank of Chicago*, 75 Ill. 595, and would seem to be decisive of the case here, as it holds that the evidence is admissible under the common counts.

The plaintiffs are then entitled to recover, but we think the court should have deducted from the amount of the judgment the sum of \$319.25, that being the sum standing to the credit of Richardson & Son at the time the drafts were returned not paid, and which was on the 11th of November, applied by appellees in the payment of a debt due from Richardson & Son prior to the agreement in June.

We think the true measure of damages in this case should be the amount due them for money paid to Richardson & Son on account of the business transactions done in pursuance of such contract.

The \$47.55, amount of insurance due upon corn shipped to appellants under such contract should be allowed, making the amount properly due plaintiffs on the 25th day of October, the sum of \$680.89, for which the plaintiffs should have judgment, with interest from the 25th day of October, 1875.

For the reason that the judgment is for too great a sum, it must be reversed, and the cause remanded; and if the appellees will remit in the court below all above the amount indicated, the court below will enter judgment for such sum without further trial.

Reversed and remanded.

Com'rs of Highways of Deer Park v. Wrought Iron Bridge Co.

THE COMMISSIONERS OF HIGHWAYS OF THE TOWN OF
DEER PARK

v.

THE WROUGHT IRON BRIDGE COMPANY.

1. **BRIDGE BETWEEN ADJOINING TOWNS.**—To give a right under the statute to one town to build a bridge at the joint expense of both, a prior contract between the commissioners of highways for the joint building of such bridge is an essential pre-requisite. No liability attaches to the commissioners refusing, even upon notice, to build without their previous consent, evidenced by contract.

2. **HOW CONTRACT SHOULD BE EXECUTED—MAJORITY OF COMMISSIONERS.**—The contract for the building of such a bridge should be executed by a majority of the commissioners of each town, acting as a separate body. The statute does not contemplate a joint meeting of the two boards of commissioners, at which meeting a majority of the six can bind both towns. Each town must be bound by the official action of its own board of commissioners.

3. **CONTRACT NOT SIGNED BY MAJORITY.**—In this case the contract was signed by only one member of the board of commissioners of one of the towns, and therefore such town is not bound by the contract. Nor does the fact that another commissioner of such town, after the completion of the work, signed the contract, create a liability against the town where none existed before. Commissioners of highways cannot bind their town by individual acts. They can only act as an official body, and when met for the transaction of public business.

APPEAL from the Circuit Court of LaSalle county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

Mr. G. S. ELDREDGE and Mr. H. T. GILBERT, for appellants; contending that as the town made no provision for taxation to pay indebtedness, no indebtedness could lawfully be created, cited *City of Springfield v. Edwards*, 84 Ill. 626; *Reynolds v. Shreveport*, 13 La. An. 426; *Goodrich v. Detroit*, 12 Mich. 279.

Upon the rule of construction of the Constitution: *People v. Draper*, 15 N. Y. 543; *People v. Morrell*, 21 Wend. 584; *Cooley's Con. Lim.* 88; *Newell v. The People*, 3 Seld. 98; *State v. Johnson*, 26 Ark. 281; *Wolcott v. Wigton*, 7 Ind. 48; *People*

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v. Lawrence, 36 Barb. 177; People v. Orange Co. 27 Barb. 575; Supervisors v. The People, 25 Ill. 183; People v. Starne, 35 Ill. 121; Wabash R. R. Co. v. Hughes, 38 Ill. 174; Town of Lebanon v. O. & M. R. R. Co. 77 Ill. 539; The People v. Trustees, 78 Ill. 136; Updike v. Wright, 81 Ill. 49; Wheeler v. Chicago, 24 Ill. 107.

There is no inherent power in municipalities to levy taxes: Cooley on Taxation, 209; Chestnutwood v. Hood, 68 Ill. 132.

An issue of bonds in excess of the constitutional limitation of five per cent. would be void: McPherson v. Foster, 43 Iowa, 48.

Where a statute gives a new power and provides a way of executing it, the power can be executed in no other way: Mix v. Ross, 57 Ill. 121; Field v. The People, 2 Scam. 79; Middleport v. Aetna Life Ins. Co. 82 Ill. 562.

Commissioners of highways can exercise only such powers as are conferred on them by law: Commissioners v. Newell, 80 Ill. 587; Brauns v. Peoria, 82 Ill. 11.

They can bind the town only in the mode prescribed by the Statute: Dillon on Mun. Cor. § 383; Pease v. Chicago, 21 Ill. 500.

A person dealing with a municipal corporation is bound to learn the nature and extent of the authority of its officers: State v. Baltimore, 29 Md. 85; McDonald v. The Mayor, 68 N. Y. 23.

The Illinois is a navigable river, and any bridge built so as to obstruct navigation would be liable to be removed: Columbus Ins. Co. v. Peoria Bridge Co. 6 McLean, 70; Jolly v. Terre Haute Bridge Co. 6 McLean, 237; Holderman v. Beckwith, 4 McLean, 286.

The laws of the United States upon the subject of commerce are supreme: Sinnot v. Com'rs, 22 How. 227; Gibbons v. Ogden, 9 Wheat. 210.

Mr. E. F. BULL, for appellee; that all that is required of town officers is a substantial compliance with the law, and the presumptions are in favor of their official acts, cited The People v. The Auditor, 2 Scam. 567; Ballance v. Underhill, 3 Scam. 453; Todemier v. Aspinwall, 43 Ill. 401.

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Commissioners of highways are a quasi-corporation: Com'rs. of Rutland v. Com'rs of Dayton, 60 Ill. 58.

Navigability of the Illinois river constitutes no defense to this action: Com'rs of Rutland v. Com'rs of Dayton, 60 Ill. 58; Dayton v. Rutland, 84 Ill. 279.

Navigability is a question of fact, not of law: Chicago v. McGinn, 51 Ill. 266.

PILLSBURY, P. J. Action of assumpsit by appellee against appellant and the commissioners of highways of the Town of Utica, brought upon a contract alleged to have been made on the 25th day of May, 1876, by the commissioners of the towns of Deer Park and Utica, jointly, with the appellee, by which the appellee was to build a bridge across the Illinois River, on the line between the towns, for the sum of \$17,400.

The declaration avers performance by the appellee, and refusal to pay by the commissioners.

The appellant filed the general issue and a plea denying the execution of the contract, both verified by affidavit, and several special pleas, to which a demurrer was sustained. Upon a trial the appellee recovered a judgment for the amount claimed with interest, and the commissioners of Deer Park appealed.

The record shows that on the 2nd day of February, 1876, the commissioners of both towns met, and a motion was made that the commissioners of highways of Deer Park enter into a contract with the town of Utica to build such bridge, which motion was lost. After this action the commissioners of highways of Utica, with J. Shangnessy, one of the commissioners of Deer Park, held several meetings, and served notices upon R. B. Williams and Nelson Willey, the other two commissioners of Deer Park, to meet with them, which they steadily refused to do, until the commissioners of Utica had advertised for proposals to build the bridge. At the time the proposals were submitted, all were present, and the bids taken under advisement.

From this time no more joint meetings were held, and no contract was entered into by the commissioners of Deer Park.

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On the 25th of May, however, the commissioners of highways of Utica executed the contract sued upon, and Shaugnessy signed it as commissioner of Deer Park. On same day the appellee executed a contract to the commissioners of Utica, reciting the contract in suit, and the fact that it had been signed by only one of the commissioners of Deer Park, and guaranteeing that the town of Utica should not be called upon to pay more than one-half of the cost of the bridge; and in case Deer Park refused to pay for one-half the bridge, then the commissioners of Utica were to sue those of Deer Park, to recover their proportion of the cost of the bridge, and that the bridge company would pay one-half of the costs and attorneys' fees in prosecuting such suit.

After the making of these contracts, and before any work was done upon the bridge under the same, the two commissioners of Deer Park who had not joined in the contract, together with the supervisor and town clerk of said town, served a written notice upon the commissioners of Utica and the appellee, that no contract would be entered into or liability incurred or recognized on the part of Deer Park in the construction of said bridge. The appellee, however, went on and completed the bridge under said contract, and it is conceded that up to the time the work was done and the money due under the terms of the agreement, that a majority of the commissioners of Deer Park took no part in building the bridge in question, or the letting of the contract, except as above set forth.

After the completion of the bridge, for some reason not shown in the record, R. B. Williams, one of the commissioners of Deer Park, who up to this time had, on behalf of his town, steadily opposed the creating of any liability against his town, acting in conjunction with Shaugnessy, passed resolutions reciting the fact of the neglect of the commissioners of Deer Park to join in building said bridge, or to enter into a joint contract for its erection, and accepting said bridge as a part of the public highway, pledging the town to maintain its portion of it, and ordering the supervisor and town clerk to issue bonds for the payment to appellee of one-half the contract price. Williams also, after said bridge was completed, attached his

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name to the contract of May 25th, 1876, and it is upon this execution of the contract that the alleged joint liability arises. This signing by Williams was, so far as the record discloses, without any consultation with or authority from his co-commissioners.

The respective towns, prior to May 25th, 1876, held an election under section 112 Ch. 121, Rev. Stat. 1874, which resulted in a vote in favor of "borrowing money to build a bridge," but no amount was specified, or time in which payment should be made, nor was any provision whatever made by either town for the payment thereof by appropriate taxation.

The above facts are all that are essential to state to a proper understanding of the case, and the question arises whether upon such facts a legal liability arises against the town of Deer Park.

Section 108 of the road and bridge act of 1874, provides that "For the purpose of building and keeping in repair such bridge or bridges, it shall be lawful for the commissioners of highways of such adjoining towns or counties to enter into joint contracts, and such contracts may be enforced in law or equity against such commissioners jointly, the same as if entered into by individuals, and such commissioners may be proceeded against jointly by any parties interested in such bridge or bridges for any neglect of duty in reference to such bridge or bridges, or for any damages growing out of such neglect."

By the 109th section: "If the commissioners of highways of any of such towns, after reasonable notice in writing from the commissioners of highways of any other such towns, shall neglect or refuse to build or repair any such bridge, when any contract or agreement has been made in regard to the same, it shall be lawful for the commissioners so giving notice to build or repair the same, and to recover by suit one-half (or such amount as shall have been agreed upon), of the expense of so building or repairing such bridge, with costs of suit and interest from the time of completion thereof from the commissioners so neglecting or refusing."

This statute is clear, that to give a right to one town to build a bridge at the joint expense of both, a prior contract between

the commissioners of highways for the joint building of such bridge is an essential prerequisite; that no liability attaches to the commissioners refusing even upon notice to build without their previous consent evidenced by contract. The commissioners of highways of each town have the right to judge of the necessity of a bridge, and the ability of their town to raise the means by taxation to pay the amount necessary for the purpose of completing it.

If the commissioners of a large and wealthy township could enter into a contract for the construction of a bridge across a stream dividing the towns, and then collect the one-half from the adjoining town, it would be in their power to bankrupt the latter when of not sufficient ability to bear a burden thus imposed. The contract for the building such bridge should in our opinion be executed by a majority of the commissioners of each town acting as a separate body. That the statute does not in this instance contemplate a joint meeting of the two boards of commissioners, at which meeting a majority of the six can bind both towns. That while the contract is joint and binding upon the two towns jointly, yet each town must be bound by the official action of its own board of commissioners.

In this case it is admitted that only one of the commissioners of highways of Deer Park executed the contract in suit until after the bridge was completed, and that the commissioners of said town, or a majority of them, refused to enter into such contract or to incur any liability upon behalf of their town respecting such work.

As a majority of the commissioners of Deer Park did not, prior to the commencement or completion of the work, enter into any contract binding upon their town, we fail to see how the town became bound to the appellee, or wherein there was any privity of contract between them. Did then the action of the commissioner Williams, in signing said contract after the completion of the work, create a legal obligation against his town? We think it did not. Up to this time no obligation, as we have seen, rested upon the town to pay for the bridge. The bridge had not been constructed under the supervision of its officers. The bridge had been built by the

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appellee, relying upon its contract with the commissioners of Utica.

That they both knew the contract was not binding upon Deer Park, is evident, from the fact that the commissioners of Utica would not themselves contract for the letting of the work to appellee until it had given them a guaranty that their town should not be liable to the appellee for more than one-half the cost thereof.

There being then no valid prior obligation upon the part of Deer Park, we are of the opinion that Williams could not of himself, by simply signing as one commissioner, create a liability where none existed before. The commissioners of highways, it is apprehended, cannot bind their towns by individual acts; there must be concert of action by at least two of them when met for the transaction of public business. The board of commissioners being a *quasi* corporation, *Town of Rutland v. Town of Dayton*, 60 Ill. 58, can only act as an official body. *Boughton v. McDonough County*, 84 Ill. 392. They are public agents, and can bind their principal only when exercising the powers vested in them by the statute, and in the time and manner designated by the law.

The individual act of Williams, therefore, in executing the contract with appellee after the bridge was built, thereby endeavoring to create a privity of contract where none existed previously, was invalid, and created no legal obligation against his town.

These views render it unnecessary to notice the point made, that the Constitution, Sec. 12, Art. IX., prohibited the issuing of bonds under the vote of the town to borrow money to build a bridge, because no provision was made by the town for the payment of the same by appropriate taxation at or before the time of creating such indebtedness. Whether this be so or not, which we do not now determine, it would seem that the vote of the town was only a delegation of power to the commissioners of highways to enter into a contract to build a bridge, and order bonds to be issued as the work progressed for the payment thereof, thereby creating an indebtedness upon the town, as contemplated by the vote. The commissioners

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had the power, notwithstanding the vote, to determine whether they would enter into a contract with the appellee. , The vote of the town did not establish a privity of contract between it and the appellee, and until a valid contract was made, the appellee had no right under such vote that it could enforce at law.

This action rests upon contract, and to entitle the appellee to recover it must show an agreement executed by the commissioners of highways in such manner as will make the judgment recovered a charge upon the town. In our opinion no such contract is shown to exist in this case.

The judgment must be reversed and the cause remanded.

Judgment reversed.

LELAND, J. having passed upon some of the questions here involved in another proceeding relating to this same bridge, took no part in the decision of this case.

B. R. MOSHER ET AL.

V.

STEPHEN ROGERS.

1. **PROMISSORY NOTE—DEFENSE—EVIDENCE UNDER.**—Appellants being sued upon a promissory note, pleaded; that in consideration of procuring appellee a certain situation, he agreed to receive in satisfaction of the note, shares of stock in the Enameling Co. and some lots then held by the Improvement Association; that the situation was procured, and the shares of stock and deed of the lots tendered to appellee. Issue was joined upon these pleas and upon the trial appellants offered evidence tending to show a chain of title from the government to the Improvement Association of the lots tendered, which evidence was excluded by the court. *Held*, that under the issues it became material for appellants to show a good title to the land in the Association, and the offered evidence should have been admitted.

2. **RIGHT OF CORPORATION TO HOLD LAND.**—*Held*, that the right of the Association to hold real estate being prohibited by statute, was one with which appellee had nothing to do, he having agreed to accept the lots of the Association it did not become him to dispute its right to make the conveyance.

APPEAL from the Circuit Court of La Salle county; the Hon.

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Mosher et al. v. Rogers.

JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

Mr. E. F. BULL and Mr. A. W. HARD, for appellants; in support of the sufficiency of defendant's plea, cited Stricklin v. Cunningham, 58 Ill. 293; Gridley v. Bane, 57 Ill. 529; Young v. Ward, 21 Ill. 223; Easter v. Minard, 26 Ill. 494.

The evidence offered tended to support the issues formed under the pleadings, and should have been admitted: Davis v. Hoxey, 1 Scam. 406; Phelps v. Jenkins, 4 Scam. 48; Reese v. Henck, 14 Ill. 482; Smith v. Gillett, 50 Ill. 290; Seeley v. Porter, 53 Ill. 102; Crowley v. Crowley, 80 Ill. 469; Hugh v. Cook County Land Co. 73 Ill. 23.

Mr. G. S. ELDRIDGE, for appellee; argued that the plea presented no defense to the note, and cited Neely v. Lewis, 5 Gilm. 31; Moss v. Riddle, 2 Pet. 277; Warrell v. Munn, 1 Seld. 229; Walker v. Crawford, 56 Ill. 445; Wimple v. Kesoph, 15 Minn. 440; Lane v. Sharpe, 3 Scam. 565; Wood v. Price, 46 Ill. 435; Emory v. Mohler, 69 Ill. 221; Merchants' Ins. Co. v. Morrison, 62 Ill. 242; Foy v. Blackstone, 31 Ill. 538; Snyder v. Griswold, 37 Ill. 216; Jones v. Albee, 70 Ill. 34; Conwell v. S. & N. W. R. R. Co. 81 Ill. 232; Mason v. Burton, 54 Ill. 350; Cease v. Cockle, 76 Ill. 484.

The Association had no authority to lay out and plat an addition to the village of Millington; it was *ultra vires*, and all executory contracts founded upon it necessarily void, and the plat was properly excluded: Carroll v. City of East St. Louis, 67 Ill. 568; Cin. Mut. Ins. Co. v. Rosenthal, 55 Ill. 85; Starkweather v. Am. Bible Soc. 72 Ill. 50; Bank of U. S. v. Owen, 2 Pet. 538.

If a part of the consideration be illegal, the entire contract is void: Henderson v. Palmer, 71 Ill. 579; Craft v. McConoughy, 79 Ill. 346; Winston v. McFarland, 22 Ill. 38.

The statute limits the power of corporations; they can take nothing by implication: Charles River B. Co. v. Warner B. Co. 11 Pet. 543; Newhall v. Galena R. R. Co. 14 Ill. 273; Petersburgh v. Metzker, 21 Ill. 205; Penn. R. R. Co. v. Canal Com'rs,

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21 Pa. St. 9; President, etc. v. McConnell, 12 Ill. 138; Caldwell v. City of Alton, 33 Ill. 416; Mix v. Ross, 57 Ill. 121.

All contracts to promote the exercise of unauthorized powers are void, as being against public policy: Miller v. Goodwin, 70 Ill. 659; City of Alton v. Ins. Co. 75 Ill. 566; People v. Dupuyt, 71 Ill. 651; Metropolitan Bank v. Godfrey, 23 Ill. 604; People v. Board of Trade, 45 Ill. 112; East Anglian R'y Co. v. Eastern Counties R'y Co. 7 Eng. L. 505; B. & O. R. R. Co. v. Wheeling, 13 Gratt. 75; Clark v. Farrington, 11 Wis. 323; Barret v. A. & S. R. R. Co. 13 Ill. 512; Bissell v. Mich. S. R. R. Co. 22 N. Y. 265; Bank of Peru v. Farnsworth, 18 Ill. 563.

SIBLEY, J. This suit was brought by Stephen Rogers against the appellants, upon a promissory note, as follows:

"\$2,000.

MILLINGTON, ILL., Dec. 13, 1875.

"One year after date, for value received, we promise to pay Stephen Rogers, or order, two thousand dollars, with interest at ten per cent. It is further agreed, that should the payee so elect, he may at any time within six months from date, by the delivery of this note, receive twenty shares of the stock of the Enameling Company of Chicago, now held by the Citizens' Improvement Association of Millington, together with one lot with each share as now given by said Association, said lots to be selected from the lots in said Association's addition to Millington, not now selected by other subscribers to stock.

"B. R. MOSHER,

"L. C. CARLOW,

"BIDDULPH & McMATH,

"S. POTTER,

"JOSEPH JACKSON,

"W. M. SWEETLAND,

"JOHN JONES."

The defendants in the court below filed several pleas. Demurrers were sustained to pleas two and three, and the defendants abided by them. To plea four the plaintiff replied severally, upon which issues were joined and a trial had that resulted in a verdict for the plaintiff, and damages assessed at \$2,512.21. From the judgment rendered upon that verdict, the defendants appealed to this court.

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No error having been assigned to the decision of the court sustaining the demurrers to pleas two and three, their sufficiency, therefore, cannot now be considered.

The refusal of the court to allow the defendants on the trial to refile the plea of general issue, after having been once withdrawn, even if assigned for error, was a matter of discretion, in the exercise of which no reason is perceived for interfering.

The remaining errors complained of (except that of overruling the motion for a new trial) relate to the refusal of the court to admit competent evidence offered by the defendants, and the final exclusion of all that had been admitted for them.

The fourth plea sets up that the only cause of action was the note described in the declaration. That the money for which the note was given was paid to and used by the Enameling Company, of Chicago, located at Millington, in the county of LaSalle, and no part of it received by, or appropriated for the benefit of the defendants, or either of them. That after the execution of the note the plaintiff agreed with the defendants, that if they would secure to him a situation in the Enameling Company at a salary of \$1,500 a year, when the works of the company were completed, he would then take \$2,000 in the capital stock of that company held by the Citizens' Improvement Association, of Millington, and one lot with each share of stock of \$100 in the Association's addition to the town of Millington, in full satisfaction and discharge of the note declared on. That the defendants, acting upon this agreement, did afterward secure to the plaintiff the situation he desired; and when the works of the Enameling Company were finished, the plaintiff, pursuant to the arrangement, entered into the employment of the company at a salary fixed at \$1,500 per year, and selected the lots in the addition laid off by the Improvement Association to the town of Millington, and agreed to surrender the note sued on, and take the stock in the Enameling Company. That the lots so selected had been held by the Improvement Association of Millington, for the plaintiff, together with \$2,000 worth of stock in the Enameling Company, subject exclusively to his order and control, and by means of which arrangement the defendants were entitled to have their note surrendered and canceled.

There were quite a number of replications filed to this plea, and it is proper here to remark, that if the plea was defective, as appellee now insists, he should have stood by his demurrer to it and not taken issue upon the facts alleged, for by so doing he waived any right to question its sufficiency.

After the introduction of considerable testimony tending to prove the agreement stated in the plea, the defendants offered in evidence a plat of an addition by the Improvement Association to the town of Millington, and proposed to follow up the evidence by showing a regular chain of conveyances from the government to the Improvement Association for the land covered by the plat, but the court refused to admit the evidence. We are at a loss to discover a sufficient reason for excluding this proof. Under the issues it became material for the defendants to show that the Citizens' Improvement Association possessed a title to the lots which it was alleged the plaintiff had agreed to take in part payment of the note, and why they were not permitted to prove that fact is not satisfactorily explained.

The idea suggested, that the Improvement Association being a corporation organized under the general law for the purpose of encouraging manufacturing interests, without any pecuniary profit, was dealing in real estate to a greater extent than authorized, is more plausible than sound.

For if the plaintiff had agreed to take these lots of the Improvement Association, and made the selection as stated in the plea, it did not become him to dispute its right to make the conveyance, since with a full knowledge of the Association's legal capacity to hold and convey real estate, he had agreed to take the lots in the Association's addition to the town of Millington, without any reservation as to its power to make a conveyance that would pass title. Besides, as the Association was authorized to hold real estate to a certain extent, if the fact as to whether it had exceeded the limits prescribed, could be inquired into upon a collateral proceeding (which is not conceded), the question should have been submitted to the jury upon proper instruction by the court.

As the evidence offered by the defendants tended to prove the issues formed by the parties, we are of opinion that the

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court erred in not admitting the testimony so offered, as well as in excluding all that had been introduced from the consideration of the jury. *Merricks v. Davis*, 65 Ill. 319; *Hutt v. Bruckman*, 55 Ill. 441, and cases referred to upon this subject. Judgment reversed and cause remanded.

Judgment reversed.

MARY L. PRATT
v.
JAMES PRATT ET AL.

DECREE AGAINST PARTIES NOT SERVED.—It is erroneous to render a decree affecting the interests of parties who are not served with process and are not before the court. The decree in this case being in part against persons over whom the court had not jurisdiction, it is reversed as to that portion, and affirmed as to the remainder.

APPEAL from the Circuit Court of McHenry county; the Hon. C. W. UPTON, Judge, presiding. Opinion filed May 2, 1879.

Mr. H. B. HURD and Mr. FRANK BAKER, for appellant; that a complainant cannot state one case in his bill and make out a different case in proof, cited *Ohling v. Luitgens*, 32 Ill. 23; *DeLeuw v. Neely*, 71 Ill. 473; *Downing v. Tuck*, 76 Ill. 71; *Morris v. Tillson*, 81 Ill. 607; *Berger v. Peterson*, 78 Ill. 638; *Rowan v. Bowles*, 21 Ill. 17; *McKay v. Bissett*, 5 Gilm. 499.

Testimony of one of the defendants as to admissions made by a deceased party, should not have been admitted: *Rev. Stat.* 1874, 488; *Connelly v. Dunn*, 73 Ill. 218; *Brown v. Hurd*, 41 Ill. 122.

Where a party acquires title by purchase at sheriff's sale, with a parol agreement to hold the title as security for a loan of money paid to relieve the land from the judgment lien, and to re-convey when the money is refunded, the deed will be treated as a mortgage: *Reigard v. McNeil*, 38 Ill. 400; *Smith v.*

Doyle, 46 Ill. 451; Kloch v. Walter v. 70 Ill. 416; Smith v. Knoebel, 82 Ill. 392; Strong v. Shea, 83 Ill. 575; Smith v. Cremer, 71 Ill. 185.

A subsequent mortgagee is entitled to precedence of advances made by a prior mortgagee who has notice of the second mortgage: Frye v. Bank of Ill. 11 Ill. 367.

Record of subsequent mortgage is notice to prior mortgagee: Spader v. Lawler, 17 Ohio, 371; Bank of Montgomery, appeal, 36 Pa. 170; Ladue v. D. & M. R. R. Co. 13 Mich. 380.

Lampson having conveyed the land with full covenants of warranty, was interested to defeat the Pratt mortgage, and his testimony should not have been received. His discharge in bankruptcy did not remove the objection: Rev. Stat. 1874, 488; Connolly v. Dunn, 73 Ill. 218; Boverton v. Byrne, Adm'r, 72 Ill. 466; Whitmer v. Rucker, 71 Ill. 410.

A mortgagor is not liable for rents and profits while in possession of the mortgaged premises: Renard v. Brown, 1 West. Jur. 486; Miss. V. & W. R'y Co. v. U. S. Ex. Co. 81 Ill. 534; O'Brien v. Fry, 82 Ill. 274; Stephens v. Ill. M. & F. Ins. Co. 43 Ill. 331.

In equity, a party to avail himself of the Statute of Limitations must plead it, so that the other party may have opportunity to account for the delay; Trustees v. Wright, 12 Ill. 432; Zeigler v. Hughes, 55 Ill. 289.

Mr. A. B. COON and Mr. B. N. SMITH, for appellees, Worthington and Lyon; that being *bona fide* purchasers of parts of the mortgaged premises, the mortgage is void as to them, cited Miller v. Marckle, 21 Ill. 152; Reed v. Noxon, 48 Ill. 323.

Mr. E. R. SMITH and Mr. E. F. ALLEN, for appellee Pratt; that fraud may be shown by circumstances, cited Carter v. Gunnels, 67 Ill. 270.

The notes and deed having been given in 1858, they were barred by the Statute of Limitations after sixteen years: Pollock v. Maison, 41 Ill. 516; Harris v. Mills, 28 Ill. 44.

A person purchasing land *pendente lite*, does so at his peril, and is as much bound by the results of the litigation as if he

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had been a party to it from the outset: *Inloe's Lessor v. Henry*, 11 Md. 524; *Salisbury v. Benton*, 7 Lans. 353; *Harrington v. Slade*, 19 Barb. S. C. 162; *Tilton v. Cofield*, 9 Chicago Legal News, 139.

Equity can only recognize and enforce a lien which is created by the parties: *Dewey v. Eckert*, 62 Ill. 218.

A verbal agreement to convey real estate to another, is within the Statute of Frauds: *Stephenson v. Thompson*, 13 Ill. 190; *Perry v. McHenry*, 13 Ill. 233.

Nor will the purchaser under such circumstances be treated as agent of the grantor: *Wilson v. McDowell*, 78 Ill. 514.

A purchaser under foreclosure of a senior mortgage acquires by his deed color of title in good faith, and such deed is a bar to foreclosure under a junior mortgage: *Mason v. Ayers*, 73 Ill. 121.

Statements of the mortgagor are admissible against himself: *Reed v. Noxon*, 48 Ill. 323.

Declarations of a party in possession are competent as against those claiming under him; *Dodge v. Freidman's S. & T. Co.* 9 Chicago Legal News, 139; *Eich v. Sievers*, 73 Ill. 194.

He who enables the commission of a fraud must suffer: *City of Peoria v. Johnston*, 56 Ill. 45; *Rawson v. Fox*, 65 Ill. 200; *Lewis v. Lanphere*, 79 Ill. 187.

Under the prayer for general relief, the court may grant that which is not specifically prayed for: *Isaacs v. Steel*, 3 Scam. 97; *McNab v. Heald*, 41 Ill. 327.

An account may be taken of rents and profits in a suit to set aside a conveyance for fraud: *Hadley v. Morrison*, 39 Ill. 392; *Fitzsimmons v. Allen*, 39 Ill. 440.

Mr. J. H. MAYBOURNE, for appellee, Miller.

PER CURIAM. There were three cases tried together by consent in the court below, and one decree rendered. Mary L. Pratt, in her individual capacity, or as administratrix of the estate of Philemon B. Pratt, deceased, was interested in each one of them, and appealed to this court. The case of James Pratt, complainant, v. Mary L. Pratt et al., was a creditor's

bill, and as a part of the relief claimed in that case the court found:

That Russell Grimes, at and before March 10, 1862, was largely indebted to said James Pratt, and suit was pending therefor, which P. B. and Mary L. Pratt knew. That James Pratt recovered a personal decree against Russell Grimes July 27, 1872, for \$8,500.75 and \$253.35 costs, and execution was issued and returned *nulla bona*, and that there is due thereon \$11,988.60. That May 1, 1858, Russell Grimes made and delivered to Mrs. Pratt his two promissory notes, one for \$1,250, due August 1, 1859, and for \$250, due November 1, 1860; and to secure the payment thereof on said day, executed and delivered, to J. B. Smith, trustee, a trust deed upon all of the west half of southwest quarter of said section 35, lying south of the Chicago and Algonquin road, then owned by said Grimes, and known as the "Kern farm;" and that at the request of Mrs. Pratt said trustee advertised and sold said lands under said trust deed, August 18, 1877, to Abel C. Carpenter.

And among other things, ordered, adjudged and decreed:

That the said trust deed of Russell Grimes to J. B. Smith, for use of Mary L. Pratt, dated February 1, 1858, and the trustee's deed from said Smith to Carpenter, be set aside, annulled, vacated, etc., as against James Pratt.

The questions argued were mainly of fact, and it is not necessary to repeat the reasons urged on that subject.

We perceive no error in the conclusions to which the court below arrived, except as to the vacation and setting aside said trust deed and the trustee's deed from Smith to Carpenter. As the question of fact as to this branch of the case must be retried by the Chancellor in the court below, we only deem it necessary to say now that neither the said J. B. Smith nor Abel E. Carpenter was served with process, nor otherwise before the court, so that it had jurisdiction of their persons.

For this reason, as they were parties in interest, it was erroneous to render the decree, or rather the portion of it on this subject, without making Smith and Carpenter parties; and for this reason only the portion of the decree which relates to the land aforesaid, and to the rights of the parties in relation to it,

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is reversed and the cause remanded, with directions to have said Smith and Carpenter made parties to the cause, and the rights of the parties interested therein ascertained and determined.

As this portion of the decree affects the interest of the said James Pratt, and that of the said Mary L. Pratt in her individual capacity, and not as administratrix, and does not affect the other parties except Smith and Carpenter and Mrs. Pratt, and is not so connected with the other matters adjudicated as to render it necessary to disturb other portions of the decree, said decree is in all other respects affirmed. And the costs in this court are divided, so that Mary L. Pratt, as an individual and not as administratrix, pays one-half, and the said James Pratt the other half of the costs by them made, respectively. The other costs to be paid by appellant, Mary L. Pratt, as administratrix, or in her individual capacity, as case may be.

Reversed and remanded.

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v.

FRANCIS BRY, use, etc.

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1. **SUIT ON LOST BOND—EVIDENCE.**—In a suit upon a lost bond, evidence of the practice of the sheriff and others in respect to the form of bonds used by them on other occasions, is wholly incompetent to prove the contents of the bond in suit.

2. **REPLEVIN BOND—MEASURE OF DAMAGES.**—Although the fact that an article returned as replevied was never actually taken into custody because attached to the realty and mortgaged, may constitute no sufficient defense to a suit on the replevin bond, yet upon the question of damages this may be shown, and in such case the measure of damages would be the amount of the loss sustained by the execution creditor by the failure of the defendant to deliver the property at the time required; not what the property would have been worth if unaffected by infirmity or prior liens, but its value subject to any defects or incumbrances that existed at the time it was replevied.

APPEAL from the Circuit Court of LaSalle county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

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Mr. G. S. ELDRIDGE, for appellant; that the replication only put in issue the fact of ownership, and hence evidence of the *bona fides* of such ownership was erroneously admitted, cited *Wheeler v. McCorriston*, 24 Ill. 40; *Van Namee v. Bradley*, 69 Ill. 299; Rev. Stat. 853.

The plea of *non est factum* put in issue the execution of a joint and several bond, and the proof showed that one of the defendants did not execute the bond. The dismissal of the case as to such defendant without amendment of the declaration, did not cure the objection: *Johnson v. Ackless*, Breese, 91; *Connelly v. Cottle*, Breese, 364; *Spangler v. Pugh*, 21 Ill. 85; *Van Court v. Bushnell*, 21 Ill. 627; *Crittenden v. French*, 21 Ill. 598; *Leahy v. Mandeville*, 7 Cranch, 208; *Ferguson v. Harwood*, 7 Cranch; *Taylor v. Riddle*, 35 Ill. 567; *Childs v. Laffin*, 55 Ill. 156; *Snell v. De Land*, 43 Ill. 323.

There was no sufficient evidence of the loss or contents of the bond: *Hazen v. Pierson*, 83 Ill. 241; *Rankin v. Crow*, 19 Ill. 626; *United States v. Bulton*, 3 Mason, 464.

The mill and appurtenant machinery were fixtures: *Mason v. Fenn*, 13 Ill. 529; *Thielman v. Carr*, 75 Ill. 385; *Arnold v. Crowden*, 81 Ill. 56.

Evidence that the property was a fixture was competent in mitigation of damages: *Dehler v. Held*, 50 Ill. 491.

Messrs. RICHOLSON & SNOW and Mr. D. H. PINNEY, for appellee; that no demand before bringing suit is necessary, cited *Peck v. Wilson*, 22 Ill. 205.

Under the issues joined it was proper to try the question whether the defendant obtained permission in good faith: *Stevison v. Earnest*, 80 Ill. 513.

A verdict will not be disturbed where there is a contrariety of testimony, even though it may appear to be against the weight of evidence: *O'Brien v. Palmer*, 49 Ill. 72; *Lowry v. Orr*, 1 Gilm. 70; *City of Peru v. French*, 55 Ill. 317; *C. & A. R. R. Co. v. Shannon*, 43 Ill. 338.

An officer of a corporation cannot take a lease from or become a contractor with the company: *Post v. Russell*, 10 Am. R. 5; *Butts v. Wood*, 37 N. Y. 317; *Bulrum v. Schanck*, 41 N. Y. 182.

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In an action on a replevin bond, an excuse that it is not in the power of the defendant to return the property, is not a good plea: *Buckmaster v. Beames*, 4 Gilm. 443.

SIBLEY, J. The only cause of action in this case was to recover upon a lost bond alleged to have been executed on the first of April, 1875, by Joshua Norton, Sr., Amzi F. Jackson and Jacob N. Chapple, to Francis Bry, coroner of the county of LaSalle, for the use of Joseph and George Whittier, in the penal sum of \$2,000.

The condition of the bond stated, was that Norton having sued out a writ of replevin against Arthur McIntyre, sheriff of that county, for certain property which he held by virtue of a writ of attachment issued in favor of the Whittiers and against the Brown and Norton Paper Company, should prosecute his suit with effect, and make return of the property replevied if return was ordered by the court.

The pleas chiefly relied on were first, *non est factum*, sworn to by Jackson and Chapple, and a plea setting up the fact that the goods replevied were the property of the plaintiff in the replevin suit, and that the merits of the case were not tried in that action. To plea four, averring an offer on the part of Norton to return the goods replevied to Rufus C. Stevens, then sheriff of the county, a demurrer was sustained upon grounds we think well taken, and therefore the court committed no error in that respect. Issues were made upon the other pleas, a jury waived, and a trial by the court, which found for the plaintiffs, and assessed the damages at \$1,076.21; from that finding an appeal was taken to this court, and quite a number of errors have been assigned for setting aside the proceedings and judgment of the Circuit Court. Something over twenty separate causes have been pointed out for reversing the decision of that court. Although the ingenuity of counsel may conceive an unlimited number of reasons for his position, it cannot be expected that this court will take them up, one by one, and examine the fine-spun threads of interwoven discussion.

And this suggestion applies equally to many of the objections

made on the trial of the cause before the circuit judge.

When a jury is waived the interest of the parties is not liable to be prejudiced by the admission of doubtful testimony, because it is to be supposed that the court, in rendering judgment, would consider such testimony only as was legitimate and proper to be introduced. We do not think the contents of the bond were sufficiently established by any competent evidence to justify a recovery upon it. No witness testified to its contents. Even the coroner who took it was unable to give the substance of what it contained. All he appeared able to say, was that he did not return the writ until he became satisfied the bond was a good one. He says that it was partly written and partly printed—the same as sheriffs used, except “coroner” was written over the word “sheriff.”

The testimony introduced relative to the practice of sheriffs and others in respect to the form of bonds used by them, was wholly incompetent to prove the contents of the one in suit. The printed forms of Culver, Page & Hoyne may have been in general use. But how could that fact afford any light upon the subject of the contents of the particular bond described in the declaration? What the sheriff and the coroner may have done in other cases could not, by any known rule of evidence, be converted into proof of what actually took place in this particular proceeding.

As the question may arise upon another trial relative to the right of the appellant to show in reduction of the damages claimed that the paper machine returned as replevied was never actually taken into custody, but was so attached to the building as to form a part of the realty, which had been mortgaged for a large amount to third parties, and the mortgage had been foreclosed, the property sold by the master in chancery under a decree of the Circuit Court, and the title transferred to the purchaser, therefore the plaintiff in the replevin suit was prevented from making a return of the machine as required by the writ of *retorno*.

This was held in *Dehler v. Held et al.* 50 Ill. 491, to be no sufficient defense to the action on the bond. But in such case it was said the measure of damages must be “the amount of

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the loss sustained by the execution creditor, by the failure of the defendant to deliver the property at the time required." Not what the property would have been worth if unaffected by infirmity or prior liens, but its value subject to any defects or incumbrances that existed at the time it was replevied. If an animal, was affected by disease, of which it afterward died, then no considerable loss could be sustained by not returning it according to the condition of the bond. If it was an inanimate species of personal property, which it is asserted the appellant in this case is estopped from denying, then the loss sustained would be its value, subject to any prior existing liens. This would be the measure of damages properly recoverable. If the property replevied was of no intrinsic worth to either of the parties claiming it, and the plaintiff in the action prevented from making a return by force of a superior right overriding all the opposing claims, to allow damages against the obligors in the bond for its full value without reference to that superior right, would be such an act of gross injustice that courts of law could not sanction.

The judgment will be reversed and the cause remanded, with leave to the appellee to amend his declaration.

Judgment reversed.

ELIJAH GIBBONS

v.

HORACE N. GOODRICH.

1. REVIVING JUDGMENT—STATUTE OF LIMITATIONS.—*Scire facias* to revive a judgment is an action within the meaning of the Statute of Limitations requiring "all actions," etc., to be commenced within sixteen years, etc.

2. CONSTRUCTION OF LIMITATION STATUTES—WHAT STATUTE APPLIES.—When a cause of action has commenced to run under a limitation statute, the enactment of a new statute extending the limitation as to such causes of action will not affect rights already existing.

APPEAL from the City Court of Aurora; the Hon. FRANK M. ANNIS, Judge, presiding. Opinion filed May 2, 1879.

Messrs. RICHOLSON & SNOW and Mr. W. T. HOPKINS, for appellant; that *scire facias* is an action, cited Bouv. Law Dic. title "Scire Facias;" Kertland v. Kribs, 34 Md. 93; Bryant v. Smith, 7 Coldw. 113; Greenway v. Dare, 1 Halst. 305; Connigal v. Smith, 6 Johns. 106; Potter v. Titcomb, 13 Me. 36; Chestnut v. Chestnut, 77 Ill. 346.

Actions arising under a former limitation law are not affected by subsequent law: Rev. Stat. 1874, Chap. 131.

Mr. A. G. McDOLLE, for appellee; that to revive a judgment is not an action, cited Crisman v. The People, 3 Gilm. 354; Challenor v. Niles, 78 Ill. 78; 1 Puterbaugh's Prac. 668.

A special law giving remedies is never repealed by a general one: Sedgwick's Con. of Stat. 98; Hume v. Gassett, 43 Ill. 297; Rawson v. Rawson, 52 Ill. 62; McDonough & Co. v. Campbell, 42 Ill. 490; The People v. Barr, 44 Ill. 198.

When acts can be harmonized by a fair construction, it will be done: Connor v. Ex. Co. 37 Ga. 397; The Distilled Spirits, 11 Wall. 356; Naylor v. Field, 5 Dutch. 287; Fowler v. Perkins, 77 Ill. 271.

PILLSBURY, P. J. On the 10th day of May, 1878, a *scire facias* was sued out of the City Court of Aurora, to revive a judgment rendered in the Court of Common Pleas of said city on the 14th day of December, 1860. Appellant, the defendant in the judgment, being served with the *scire facias*, appeared, and pleaded that the writ of *scire facias* was not issued within sixteen years next after the rendition of the judgment. To these pleas the plaintiff below demurred, and the court sustaining the demurrer, ordered execution upon the judgment, and the defendant below appeals to this court.

Several questions of a technical character are made upon the record, but we shall only notice the action of the court in sustaining the demurrer to the pleas of the Statute of Limitations, as in our opinion this is decisive of the controversy between the parties.

By the common law of England, if the plaintiff failed to sue out execution within a year and a day after the judgment was

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entered, an action of debt founded upon it was his only remedy to revive this dormant judgment; but by the statute of 13 Edw. I. Ch. 45, *scire facias* was provided for revival of such judgments. This statute being passed long prior to the fourth year of James the First, and being of a general nature, is a part of the law of this State, and as such the remedy by *scire facias* to revive judgments has been, by both courts and the legislature, recognized as fully existing in our State.

And here it may be observed that only two remedies exist upon judgments—*scire facias* and debt. By the statute of 1827, debt and *scire facias* were treated as concurrent remedies, and the time within which either could be brought was twenty years. This section of that statute was incorporated into the revision of 1845, and became section five of the chapter entitled "Limitations." This section provides that "judgment in any court of record in this State may be revived by *scire facias*, or an action of debt may be brought thereon within twenty years next after the date of such judgment, and not after."

By an act entitled "an act to amend the several laws concerning limitations of actions," approved Nov. 5, 1849, it is provided: "That all actions founded upon any promissory note, simple contract in writing, bond, judgment, or other evidence of indebtedness in writing, made, caused, or entered into after the passage of this act, shall be commenced within sixteen years after the cause of action accrued, and not thereafter;" and by the fourth section thereof so much of the act of 1845 as was in conflict therewith was repealed.

The time when the "cause of action" was deemed to have accrued under said act, was fixed by the act of 1859, Sess. laws, p. 125, at the date of the rendition of the judgment. These two last mentioned acts were in force at the time the judgment in question was rendered, and the inquiry is whether the act of 1849 repealed the act of 1845 so far as it relates to the proceeding by *scire facias* to revive judgments, and this depends upon the construction to be given to the words "all actions" in the former act.

If *scire facias* is an action within the meaning of that statute, there can be no doubt of such repeal.

Littleton, speaking of the subject of revival of judgments, Sec. 505, says: "But if after the year and day the plaintiff will sue a *scire facias*, to know if the defendant can say anything why the plaintiff should not have execution, then it seemeth that such release of actions shall be a good plea in bar. But to some seems the contrary, inasmuch as the writ of *scire facias* is a writ of execution, and is to have execution, etc. But yet, inasmuch as upon the same writ the defendant may plead divers matters after judgment given to oust him of execution, as outlawry, etc., and divers other matters, this may be well said an action."

Lord Coke observes, in commenting upon this passage in Littleton, 290, b.: "So as by the writ it appeareth that the defendant is to be warned to plead any matter in bar of execution; and therefore, albeit it be a judicial writ, yet because the defendant may thereupon plead, this *scire facias* is accounted in law to be in the nature of an action; and therefore a release of all actions is a good plea in bar of the same. And here it is to be observed that every writ whereunto the defendant may plead, be it original or judicial, is in law an action."

In *Pulteney v. Townson*, 2 W. Blackstone, 1226, the question was whether *scire facias* was an action within the statute of 17 Car. 2, which required bail upon writs of error.

Gould, Blackstone, and Nares, J., held "That a *scire facias* was upon principle most clearly a personal action, and that they had the authority of Littleton, Coke and Holt to call it so; that the reason they give for it is unanswerable—the defendant has a power to plead to it."

The Supreme Court of Maine in *Potter v. Titcomb*, 13 Me. 36, hold that the process of *scire facias* is in itself an action, and subject to the statute of that State abolishing special pleadings in civil actions. So in *Goningal v. Smith*, 6 Johns. 106, it is said that a *sci. fa.* is a new action, and requires a new warrant of attorney; also in New Jersey, *Greenway v. Dore*, 1 Hals. 305: "Every *scire facias* is a new and independent action, referring to the former proceedings, but wholly distinct from them."

In 34 Maryland, 93, *Kirkland v. Kribs*, the court say: "To

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the *scire facias* the defendant has the right to plead, and although generally termed a judicial writ, it is classed and recognized by all the authorities as an action."

In *Fenner v. Evans*, 1 T. R. 267, a *scire facias* had been issued to revive a judgment entered prior to the act of 17 Geo. 3 C. 26, and execution had been taken out upon it. Upon a rule obtained to set aside the *sci. fa.* and execution, the question arose whether this proceeding was within the second section of that act, providing "That no action shall be brought on any such judgment already entered, etc." The court held that *scire facias* was an action within that section of the statute, and set aside both the writ and execution. While it is true that some authorities hold that for some purposes *scire facias* is not an action, we have not been referred to any holding that it is not included in a statute barring "all actions" within a certain time. We feel bound, therefore, by the authorities above cited, to hold that *scire facias* is included within the limitation act of 1847. Legislative action appears also to clearly indicate the intention of the law-making power to so consider it. Debt and *scire facias* being the only remedies upon judgments, have been treated by the legislature as concurrent, and in all the statutes of limitations no preference has been given to either one as to the time within which the action was to be brought.

In the limitation acts of 1827 and 1845, either would lie within twenty years; by that of 1849 as we have seen, both were included in the words "all actions," and by that of 1873, they were again extended to twenty years, by express terms.

It is hardly to be supposed that the legislature intended by the act of 1849, to allow a plaintiff to revive his judgment by *scire facias* at any time within twenty years, and not permit it to be used as an evidence of indebtedness in an action of debt upon it, unless such action should be commenced within sixteen years.

The object of the statute was not to discriminate between the two actions by which the plaintiff could obtain satisfaction of his dormant judgment, but was to fix a time when the presumption of satisfaction should be conclusive.

It is urged, however, that as the statute of 1873 extended the

period of limitation to twenty years, and as this act was passed while the statute of 1849 was running, and before the limitation had expired, the effect was to extend the time to the full term of twenty years before the bar would be complete.

As we have seen, the statute of 1849 commenced to run upon this judgment from the day of its rendition, and while that statute was repealed by an act of the twenty-seventh General Assembly, approved Apr. 4, 1872, Sess. Laws 1871-2, p. 556, yet by that act it is provided that such repeal "should not be construed so as to affect any rights or liabilities, or any causes of action that may have accrued before this act takes effect."

The act of 1873, fixing the limitation at twenty years, was passed by the twenty-eighth General Assembly, and by an act passed at the same session, entitled "an act to repeal certain acts therein named," Rev. Stat. 1874, p. 960, it is provided, that "When any limitation law has been revised by this or the twenty-seventh General Assembly, and the former limitation law repealed, such repeal shall not be construed so as to stop the running of any statute, but the time shall be construed as if such repeal had not been made."

Taking all these statutes into consideration, it is evident that as to causes of action already existing under the act repealed, such statute nevertheless continued to run, notwithstanding such repeal.

We are of the opinion, therefore, that the court erred in sustaining the demurrer to the pleas of the Statute of Limitation of sixteen years, for which error the judgment must be reversed and the cause remanded.

Judgment reversed.

Nolan v. Vosburg.

JOSEPH NOLAN

v.

DAVID M. VOSBURG, use, etc.

1. JURY—TAKING BOOKS, ETC., ON THEIR RETIREMENT.—A jury cannot be permitted on retiring, to take books or papers not introduced as evidence on the trial, unless by consent of parties, and where the record fails to show that books of account, taken by the jury, were introduced as evidence, the error is sufficient ground for reversal.

2. SET-OFF—STATUTE OF LIMITATIONS—INSTRUCTION.—Where the defendant claimed a set-off, and that plaintiff's demand was barred by the Statute of Limitations, an instruction on the part of the plaintiff to the effect that the defendant is liable if the jury believe the debt had not been paid, and that the defendant promised to pay as alleged, was erroneous, in that it excluded from the jury the consideration of defendant's claim of set-off.

3. BURDEN OF PROOF.—An instruction that the burden of proof is upon the defendant to establish his set-off, although correct in that particular, was held defective because it left out of view that the burden of proof in the first instance was upon the plaintiff to show the original indebtedness, and the new promise to take the case out of the operation of the statute.

APPEAL from the Circuit Court of LaSalle county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

Messrs. RICHOLSON & SNOW, for appellant; upon the question of new promise, cited Norton v. Colby, 52 Ill. 198; Mullett v. Shrumph, 27 Ill. 110; Ayers v. Richards, 12 Ill. 146; Parsons v. N. Ill. C. & I. Co. 38 Ill. 430; Keener v. Crull, 19 Ill. 189; Carroll v. Forsyth, 69 Ill. 127; Wachter v. Albee, 80 Ill. 47.

Messrs. J. W. & E. S. BROWNE, for appellee.

SIBLEY, J. In the court below, Vosburg for the use of Breese, recovered a judgment against Nolan, the appellant, for \$76.08, founded on an account for goods purchased by the latter of the former. The cause having originated before a justice of the peace, it will be presumed that issues were formed on the pleas of Statute of Limitations and set-off.

Breese, the person for whose use the suit was brought, testified on the trial in the Circuit Court, that he purchased the account of Vosburg against Nolan, which amounted to \$55.70, and in the spring of 1877 he exhibited this account to Nolan, who then promised to pay it, at the time claiming no set-off; but previously had spoken of charges against him, which was the reason they had not before settled. Very little other testimony was introduced on his part.

The promise to pay in the spring of 1877, as well as the correctness of the account, was denied by Nolan. He also on the trial claimed a set-off of many items, and introduced his books of account in evidence to support his testimony.

The bill of exceptions shows that the books of Vosburg were handed to the witness, Breese, but it does not appear they were offered in evidence, and the contents of them are not anywhere stated. The Circuit Court, however, permitted the jury to take these books when retiring to consider their verdict. To this the appellant objected, and has here assigned for error the ruling of the court upon that subject. That it was obviously incorrect, leaves no room for doubt. The law is too well settled, that the jury cannot be permitted to take in its retirement books or papers not introduced as evidence on the trial (unless by consent), to admit of any question. To allow it would be opening the door leading to a loose and dangerous practice. Indeed it is not insisted by counsel for appellee that such a practice could be tolerated.

But it is intimated that these books were introduced in evidence, and that fact, for some reason, is left out of the bill of exceptions. The intimation, it is well known, can have no force in determining the question presented by the record. The bill states that it contains all the evidence offered on the trial by either party, and the books could be considered by the jury only as a portion of the evidence. Finding no record of their introduction, we must presume that none took place.

The errors assigned in respect to the plaintiff's instructions given, although calculated in some measure to mislead the jury, might not be sufficiently erroneous to justify a reversal on that account alone; still, it may not be improper to give them a casual notice.

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1. "If the jury find, from the evidence, that the defendant owed the plaintiff, on the 15th day of March, A. D. 1870, \$55.70, and that it has not been paid, and that within five years before this suit was brought the defendant recognized the debt as due, and expressly promised to pay it by a day named, it will be sufficient to prevent the bar of the Statute of Limitations, and the plaintiff will be entitled to recover said amount."

2. "If the jury believe, from the evidence, that the defendant purchased the goods of the plaintiff, as claimed, and did not pay for them at the time, but sets up payment by work as his defense, the burden of proof is upon the defendant to satisfy the jury by a preponderance of the evidence; that he has paid amounts as claimed to the plaintiff on this particular account." The first tells the jury that if the defendant, in 1870, owed the plaintiff \$55.70, and that the same had not been paid, and that within five years the defendant promised to pay the debt, this was sufficient to prevent the bar of the Statute of Limitations, and the plaintiff would be entitled to recover.

The debt might not have been paid, and yet the defendant's set-off should not have been entirely excluded from the jury.

The 2nd is correct enough in stating that the burden of proof was on the defendant to establish payment, except it puts out of view the fact that this burden of proof was in the first instance on the plaintiff to make out not only the original indebtedness, but also to establish the new promise in order to take the case from the operation of the statute.

The only other error it is thought necessary to consider, is that the verdict of the jury exceeds an amount authorized by the evidence. The sum due, according to the testimony of the real plaintiff at the time of the new promise claimed in April or May, 1877, was \$55.70. Allowing interest on that amount at the rate of six per cent. for a little more than one year, could not by any possible calculation be \$20.38, as the jury must have found. But it is suggested by counsel for appellee that the books of the plaintiff which the jury were permitted to take, showed a footing much larger against the defendant than that sum. This, if true, affords an additional reason (provided any was needed), against allowing the books to be taken by

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the jury in the manner stated, since the plaintiff in interest had sworn that the amount due by the books, both on his examination in chief and cross-examination, was between \$50 and \$60. He at least should be concluded by his own testimony of what appeared to be due the nominal plaintiff, and if the books had indicated a different footing, then the defendant should have had an opportunity to object to their introduction, or if admitted, to make his own comments upon the discrepancy.

For the errors indicated, the judgment will be reversed and the cause remanded for a new trial.

Judgment reversed.

CHARLES J. BORCHSENIUS

v.

ANNA IRGENS.

STATEMENT—SET-OFF.—Appellee sued appellant on a note for \$850. Appellant pleaded *inter alia* that the husband of appellee, being indebted to appellant, procured an insurance on his life, and delivered the policy to appellant to secure payment of said debt; that appellee, desiring to secure the insurance on her husband's life, agreed with appellant to pay to him such sum as would be found due from her late husband to appellant upon a settlement of their partnership matters, in consideration that he would assign said policy to her, which was done, the money collected, and \$850 paid to appellant, for which said note was given. *Held*, that the agreement constituted an original contract between appellant and appellee, and that appellant's set-off of the amount due from the deceased husband should have been allowed against the note.

APPEAL from the Circuit Court of LaSalle county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

Messrs. Richolson & Snow for appellant.

Mr. J. H. FOWLER, Mr. CHASE FOWLER and Mr. John B.

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RICE, for appellee; that the partnership accounts between appellant and appellee's deceased husband could only be settled in County Court, cited Rev. Stat. 1874, 120; Breckenridge v. Ostrom, 79 Ill. 71.

PILLSBURY, P. J. This is an action of assumpsit commenced by the appellee against the appellant upon a promissory note, dated Feb. 29, 1876, and due one day after date, with ten per cent. interest, and for the sum of \$850.

The defendant filed three pleas, the third of which averred, in substance, that Frederick Irgens, the husband of the plaintiff, a short time previous to his marriage with the plaintiff, was indebted to the defendant in about the sum of \$600, and for the purpose of securing the defendant, said Irgens insured his life for \$1,000, and delivered the policy of insurance to the defendant; that the defendant paid the premium on said policy out of his own money, and soon thereafter said Irgens married the plaintiff, and about six months after said marriage, died, leaving the plaintiff his widow; that defendant still held said policy as security for said debt, the same not having been paid, and the plaintiff being desirous of obtaining said policy, for the purpose of having the same collected and paid over to her, she and the defendant agreed that they would select arbitrators who should examine and report how much Irgens would be indebted to defendant upon a settlement of their partnership matters, they having been partners in business, and upon an award being made the defendant should surrender such policy for her benefit, and out of the money arising therefrom she would pay such award. The plea further avers, that under such submission, which was in writing, signed and sealed, arbitrators were selected and an award made, finding that Irgens was indebted to the defendant in the sum of \$486.25; that such award was satisfactory to the plaintiff, who agreed to pay it; that thereupon defendant delivered said policy of insurance up, and the same was collected, and the amount paid to the plaintiff as specific allowance awarded by the County Court; that she received as such allowance all the estate of her said husband; that the plaintiff, after the receipt of

said money, paid over to the defendant the sum of \$850, for which said note was given, concluding with an offer to set off said sum against the plaintiff's claim upon the note.

To this plea the court sustained a demurrer, and defendant abided by the plea and went to trial upon the others.

It is urged in support of the demurrer, that as Irgens was a partner of the defendant, the partnership estate must be settled under the statute through the Probate Court, and the plaintiff could not submit the indebtedness to defendant to arbitration.

It appears by the averments of the plea, that the defendant held the policy of insurance as a pledge for the payment of such indebtedness. The defendant then had a lien upon it for the payment thereof that he could enforce, and if he surrendered such pledge at the request of the plaintiff, who it appears, well knew she would obtain all the money arising therefrom, such surrender would be a sufficient consideration to support a promise upon her part to pay said indebtedness.

So far as we can see, the contract was fairly entered into and based not only upon a valuable but adequate consideration, and between parties capable of contracting.

By her promise to pay out of the fund the indebtedness for which appellant held the policy, he allowed her to control its collection and receive the whole \$1,000, being the amount of the policy, and she having turned over to him the sum of \$850 of it, for which he gave the note, we are of the opinion that he has a proper set-off to the amount found to be due by the arbitrators regularly chosen by them.

The question whether this settlement would be binding upon the administrator of Irgens does not arise upon this record, therefore we do not pass upon it, but place our decision upon the ground that the contract alleged in the plea was an original one between the parties, and no legal objection appearing to it, the court should enforce it as made.

A point is made by the appellant that he should be allowed as a set-off the sum of about \$100, consisting of a running account for goods obtained by and charged to Irgens, from the store of Irgens and appellant. So far as appears by this record, this account was due to the firm, and was included in

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the amount found due Borchsenius from Irgens by the arbitrators, and as we hold that he is entitled to set-off the award under the contract between him and the appellee, this necessarily disposes of any account due from Irgens to him at the time of the award.

For the reasons above given, the judgment must be reversed and the cause remanded, with leave to the plaintiff to reply to the third plea, if she shall be so advised.

Judgment reversed.

THE VILLAGE OF WARREN

V.

JOHN W. WRIGHT.

1. MUNICIPAL OFFICERS—DUTY AS TO SIDEWALKS.—Trustees of villages are bound to exercise ordinary care and diligence to keep the sidewalks in the village safe, and if in the exercise of this duty they bestow ordinary care and diligence, no liability arises, though the sidewalk may not be reasonably safe.

2. PRACTICE—INSTRUCTIONS MUST STATE THE LAW CORRECTLY.—In cases where there may be doubt whether substantial justice has been done, each instruction of appellee or defendant in error must state the law correctly, or there should be a reversal.

3. NOTICE OF DEFECTS—WHERE SIDEWALK NOT CONSTRUCTED BY CITY.—Where the sidewalk is constructed by the property owner, and not by the city, notice to the city of its condition is requisite to charge the city with liability.

4. INSTRUCTION ASSUMING FACT PROVED.—An instruction which assumes that the defendant neglected to exercise ordinary care and diligence, when the fact of such neglect was contested, is erroneous.

Semle—That it is improper to inform the jury in each instruction that the plaintiff claimed a certain amount, and to caution them as many times that they should be careful to allow no more.

ERROR to the Circuit Court of Jo Daviess county; the Hon. JOHN V. EUSTACE, Judge, presiding. Opinion filed May 2, 1879.

Mr. J. W. LUKE, for plaintiff in error; that the allegations

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and proof must correspond, cited *Moss v. Johnson*, 22 Ill. 633; *Ill. Cent. R. R. Co. v. McKee*, 43 Ill. 19; *City of Bloomington v. Goodrich*, 10 *Chicago Legal News*, 353.

A city is only bound to see that its sidewalks are reasonably safe: *City of Chicago v. McGiven*, 78 Ill. 347; *City of Rockford v. Hildebrand*, 61 Ill. 155; *City of Quincy v. Barker*, 81 Ill. 300.

Cities are liable only where the authorities know or by reasonable diligence may ascertain, that the sidewalks are out of repair, and when sufficient time has elapsed after notice, to make the necessary repairs: *City of Peru v. French*, 55 Ill. 317; *City of Chicago v. Scholten*, 75 Ill. 468; *City of Chicago v. McCarthy*, 75 Ill. 602.

Where the city did not construct the sidewalk, notice of its defect is requisite to create a liability: *City of Rockford v. Hildebrand*, 61 Ill. 155.

The mere non-feasance of a city in respect of such repairs, cannot be charged as willful neglect, so as to raise a liability for more than compensatory damages: *City of Decatur v. Fisher*, 53 Ill. 407; *City of Chicago v. Langlass*, 52 Ill. 256.

A judgment will be reversed when there is no evidence to sustain a verdict, or when it is manifestly against the weight of evidence: *Reynolds v. Lambert*, 69 Ill. 495; *C. B. & Q. R. R. Co. v. Gregory*, 58 Ill. 272; *Smith v. Slocum*, 62 Ill. 354; *City of Rock Island v. Vanlandschoot*, 78 Ill. 485; *City of Chicago v. McCarthy*, 75 Ill. 602.

Instructions should be consistent, and present the law of the case accurately: *C. B. & Q. R. R. Co. v. Payne*, 49 Ill. 499; *C. & A. R. R. Co. v. Murray*, 62 Ill. 326; *Baldwin v. Killian*, 63 Ill. 550; *Ill. Cent. R. R. Co. v. Maffit*, 67 Ill. 431; *C. & A. R. R. Co. v. Mock*, 72 Ill. 141.

Messrs. D. & T. J. SHEEAN, for defendant in error; upon the question of the duty of a city to keep its sidewalks in repair and liability for neglect, cited *City of Bloomington v. Bay*, 42 Ill. 503; *City of Joliet v. Verley*, 35 Ill. 58; 42 Ill. 507; *Schmidt v. N. & W. R. R. Co.* 83 Ill. 405.

As to notice of defect: *City of Rockford v. Hildebrand*, 61

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Ill. 155; *City of Springfield v. Doyle*, 76 Ill. 202; *Alexander v. Mt. Sterling*, 71 Ill. 366.

As to setting aside a verdict where the evidence is conflicting, but not palpably against the weight of evidence: *Carrigan v. Hardy* 46 Ill. 502; *Sherman v. C. & M. R. R. Co.* 48 Ill. 523; *Belden v. Innis*, 84 Ill. 78; *C. & N. W. R. R. Co. v. Dement*, 44 Ill. 74; *Baker v. Robinson*, 49 Ill. 299; *Ehrich v. White*, 74 Ill. 481; *Melburn v. Schurin*, 49 Ill. 69; *Jacquin v. Davidson*, 49 Ill. 82; *Powell v. Feeley*, 49 Ill. 143; *Lalor v. Scanlan*, 49 Ill. 152; *C. F. R. & B. Co. v. Jameson*, 48 Ill. 281; *Bunker v. Green*, 48 Ill. 243; *C. & R. I. R. R. Co. v. Hutchins*, 34 Ill. 108; *C. & G. E. R'y Co. v. Vosburg*, 45 Ill. 311; *Allan v. Payne*, 45 Ill. 339; *Cadwell v. Sherman*, 45 Ill. 348; *Bruce v. Am. Ex. Co.* 50 Ill. 201; *Kuhnen v. Blitz*, 56 Ill. 171; *Chicago City R'y Co. v. Young*, 62 Ill. 238; *Bourne v. Stout*, 62 Ill. 261; *C. R. I. & P. R. R. Co. v. Reidy*, 66 Ill. 43; *DeClurg v. Mungin*, 46 Ill. 112; *Chapman v. Stewart*, 63 Ill. 332; *O'Reiley v. Fitzgerald*, 40 Ill. 310; *McCarthy v. Mooney*, 49 Ill. 247; *Young v. Bush*, 48 Ill. 42; *Neustadt v. Hall*, 58 Ill. 172; *Presb. Ch. v. Emerson*, 66 Ill. 269; *Chicago v. Garrison*, 52 Ill. 516; *Plummer v. Rigdon*, 78 Ill. 222; *Miller v. Balthasser*, 78 Ill. 302; *Wallace v. Wren*, 32 Ill. 146; *C. & A. R. R. Co. v. Shannon*, 43 Ill. 338; *O'Brien v. Palmer*, 49 Ill. 72.

The verdict will not be disturbed even when against the weight of evidence, and such weight does not depend upon the number of witnesses: *C. & R. I. R. R. Co. v. McKean*, 40 Ill. 218; *Ill. Cent. R. R. Co. v. Gillis*, 68 Ill. 317; *Bishop v. Busse*, 69 Ill. 403.

It is for the jury to give credit to such witnesses as they may believe: *Crain v. Wright*, 46 Ill. 107; *Wood v. Hildreth*, 73 Ill. 525; *Holcomb v. Tuttle*, 79 Ill. 409; *Foos v. Sabin*, 84 Ill. 565; *Dunning v. Fitch*, 66 Ill. 51; *Robinson v. Parish*, 62 Ill. 130; *Bishop v. Busse*, 69 Ill. 403; *Wiggins Ferry Co. v. Higgins*, 72 Ill. 517.

If substantial justice has been done the verdict will not be set aside: *Smith v. Schultz*, 1 Scam. 490; *Gillett v. Sweat*, 1 Gilm. 475; *Greenup v. Stoker*, 3 Gilm. 202; *Underhill v. Fake*, 46 Ill. 50; *Hall v. Lincoln*, 46 Ill. 52.

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Where the evidence is so conflicting as to leave the question of right uncertain, the verdict will not be disturbed: *Evans v. Fisher*, 5 Gilm. 569; *Pullian v. Ogle*, 27 Ill. 189; *St. Louis R. R. Co. v. Gilham*, 39 Ill. 455; *Stevens v. Brown*, 58 Ill. 289; *Chapman v. Burt*, 77 Ill. 337.

Even though the Appellate Court would be better satisfied if the verdict had been the other way: *Bloom v. Crane*, 24 Ill. 48; *Scarritt v. Carruthers*, 29 Ill. 487; *Voltz v. Stephani*, 46 Ill. 54; *Varner v. Varner*, 69 Ill. 445.

Upon the question of damages: *Ill. Cent. R. R. Co. v. Simmons*, 38 Ill. 242; *Chicago v. Fowler*, 60 Ill. 322; *Chicago v. Langlass*, 66 Ill. 361; *City of Galesburg v. Higley*, 61 Ill. 287; *N. L. Packet Co. v. Bining*, 70 Ill. 571; *Ill. Cent. R. R. Co. v. Ebert*, 74 Ill. 399; *Peoria Bridge Co. v. Loomis*, 20 Ill. 236; *Frink v. Schroyer*, 18 Ill. 416; *Chicago v. Jones*, 66 Ill. 349; *Moore v. A. & S. R. R. Co.* 10 Barb. 623; *P. C. & St. L. R. R. Co. v. Thompson*, 56 Ill. 138.

That erroneous instructions will not always be ground for a reversal: *Howard F. & M. Ins. Co. v. Cornick*, 24 Ill. 455; *Hardy v. Keeler*, 56 Ill. 152; *Curtis v. Sage*, 35 Ill. 22; *Watson v. Wolverton*, 41 Ill. 241; *Ill. Cent. R. R. Co. v. Swearingen*, 47 Ill. 206; *Chicago v. Hesing*, 83 Ill. 204; *Hazen v. Pierson*, 83 Ill. 241; *Foster v. C. & A. R. R. Co.* 84 Ill. 164; *McConnell v. Kibbe*, 33 Ill. 177; *Thompson v. Force*, 65 Ill. 370; *Hewitt v. Jones*, 72 Ill. 218; *Dishon v. Schorr*, 19 Ill. 59; *Elam v. Badger*, 23 Ill. 498; *N. E. F. & M. Ins. Co. v. Wetmore*, 32 Ill. 223; *Hall v. Groufe*, 52 Ill. 421; *Ryan v. Donnelly*, 71 Ill. 101; *Pierce v. Hasbrook*, 49 Ill. 25; *Town of Vinegar Hill v. Busson*, 42 Ill. 45; *Gilchrist v. Gilchrist*, 76 Ill. 281; *Warren v. Dickson*, 27 Ill. 115; *Morgan v. Peet*, 32 Ill. 281; *Stowell v. Beagle*, 79 Ill. 526; *Van Buskirk v. Day*, 32 Ill. 206; *Latham v. Roach*, 72 Ill. 179; *Murphy v. The People*, 37 Ill. 448; *Walker v. Collier*, 37 Ill. 362.

Erroneous instructions will not reverse if they appear to work no injury to the party complaining: *Andes Ins. Co. v. Fish*, 71 Ill. 620; *P. A. & D. R. R. Co. v. Sawyer*, 71 Ill. 361; *Rankin v. Taylor*, 49 Ill. 451; *Coursen v. Ely*, 32 Ill. 338; *City of Alton v. Hope*, 68 Ill. 167; *Wiggins Ferry Co. v. Higgins*, 72 Ill. 517;

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Sterling Bridge Co. v. Baker, 75 Ill. 139; Rice v. Brown, 77 Ill. 549; Reynolds v. Greenebaum, 80 Ill. 416.

Giving or refusing instructions containing mere abstract propositions of law, is not error: Ryan v. Donnelly, 71 Ill. 100; Tuttle v. Robinson, 78 Ill. 332; Ill. Cent. R. R. Co. v. Swearingen, 47 Ill. 206.

LELAND, J. This was an action on the case by appellee, against appellant, to recover damages for an injury caused by the fall of a sidewalk, through the alleged negligence of the latter.

On the south side of Main street, there was a sidewalk built in 1858 or 1859, by the then lot owner. The portion of the walk which fell was in front of two buildings, and of the space of about eight feet between them, the easternmost called Brand's and the other Brink's. There was a depression in the surface of the earth, by reason of which the portion of the sidewalk which fell was about seven feet above the ground. The depression had been filled in the street nearly up to the girders upon which the stringers rested. There was a stone wall parallel to and seven feet distant from the front walls of the buildings. The girders were five feet apart, and about two inches higher at the south ends than at the north, with their north ends resting on the top of the street wall, and their south ends inserted in holes in the walls of the buildings, except that the one girder which was in the space between the buildings, rested upon the top of a post. On the girders and at right angles with them, were four or five, probably four, 2x6 stringers to which the boards were nailed. The stringers were probably not nailed to the girders. Whether the post upon which the girder rested, was set upon a stone, stood upon the surface of the earth or was driven into it, does not appear. Nor does it appear whether the girder was nailed to it, nor whether the post was in any way braced or stayed. The end of the girder resting on the post, and of the one five feet east from it, which was in a hole near the west side of the Brand building, on May 11th, 1877, fell simultaneously, or possibly one of the supports may have given way wholly or partially

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before the other did, leaving the fallen portion of the sidewalk about fifteen feet in length at an angle of forty-five degrees, with the south side or side nearest the buildings on the ground and the north side on or against the street wall.

There were four persons on it when it fell; three of them near the building, and one, appellee, near the street wall. Those near the building were unhurt. Appellee plunged forward, or slid down the inclined plane, and fell between the two buildings, and was hurt, mainly in the small of the back. It is not easy to determine from the evidence how serious the injury was, or that it was really a serious one at all. One jury thought appellee was injured to the extent of \$2,000, and the last one fixed the amount at \$3,000. Sympathy, however, is often so strong in such cases that it is difficult to restrain the impulse to be liberally charitable, when the fund to be bestowed is another's. There was a flight of stairs on each side of the space between the buildings, leading up to the second story. The stairs nearly filled the space, and rested on the sidewalk. The stairs of the Brink building had settled at the side farthest from the building, so that the steps were not horizontal, but were lowest at the outer ends. The sidewalk had settled or sagged down between the buildings some few inches, probably about four or five. As there is no other way to account for this, except by the settling of the top of the post or point of support under the girder, we may assume that this was done. It is no matter how it was done. The top of the post was in some way lowered, and the superstructure went down also; the girder by its own weight, if not attached to the stringers, and the latter were sprung or bent down. A mechanic was employed in November, 1874, to repair the Brink stairs, and in order to bring the steps up to the horizontal, instead of putting a post under the end of the girder in place of or near the other, he put a six-inch post, as he says, about five feet from the Brand building and four feet from the Brink building, and placed it under the stringer. This new post of the stair repairer must have been near to the old post of the sidewalk constructor. When he had the sidewalk and steps raised up so as to be horizontal, or nearly so, with his post under the

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stringer, the place of support was, of course, transferred from the old post to the new one, unless he had left a wedge, used in raising between the top of the old post and the girder or between the girder and the stringer or all the stringers. And so it would be if the wedge placed there got out.

The mechanic was repairing stairs, not a sidewalk; and it is quite probable that when he got through with his work, there was no very good reason why the girder should remain on the top of the post, or why the post with the girder on it should not go down. The stringer on the new post was not the only one raised. All the others between it and the street wall must have gone up too, some more and some less; and so it might have been with the other girder which fell. The superincumbent weight might have been taken wholly or in part off both girders, leaving them in a condition to be easily moved. It may also be that by not raising the stringer on the new post perpendicularly, but by pressing it street-ward, while the stringers and girder at the Brand corner were still in contact, the latter may have been drawn wholly or partly out of the hole in the wall. And to this result the tapping of the stringers as they rose and fell, might have contributed. If such were the circumstances, it is probable that the walk did shake and teeter some before it fell. The exact time when and manner in which these two girders went down, might be material in enabling us to determine whether the original construction was with ordinary care and diligence, or whether, if the original construction was well enough, and the whole trouble came from setting that new post under the stringer instead of the girder, ordinary care was used by the trustees to ascertain what the matter was, and to apply the remedy. It might be said that it was asking a little too much of the trustees to require them to have done so, when the attorneys and witnesses do not explain how the thing was done. We can imagine now how the sidewalk could have been made safer when originally constructed, or if the trouble came from repairing the stairs, which seems probable how it might have been avoided; but it is often easier to ascertain after the effect is produced, what the cause was, than to discover what may be the future effect of an existing cause.

The case at bar is not so clear for the appellee, taking into account the doubt as to the extent of his injury, the magnitude of the verdict, and the question whether appellant has not really exercised ordinary care and diligence, that we can say that there has been that substantial justice done which renders inaccuracy of ruling by the court below unimportant in an appellate tribunal.

The only question, therefore, about which we propose to express an opinion, is that as to the instructions.

Without considering what would be the effect if the bill of exceptions did show that the five instructions given for appellee were not all that were given for him as claimed by appellee, we think it does substantially appear that he asked for no others. The conclusion that there might have been others between those asked for by appellee, and those asked for by appellant, is, we think, fairly excluded by the language of the bill of exceptions.

It is not necessary to investigate whether the appellee exercised proper care. He has been injured without fault on his part. Nor to say anything further as to the extent of his injury, except to say that there is always in such cases a strong bias on the part of a plaintiff, tending to cause exaggeration, which is to be guarded against. Two out of the three physicians examined in this case stated that they thought appellee was trying to exaggerate and magnify the extent of his injury. A man would, indeed, be something more than human, if his conduct would be precisely the same when examined by a surgeon, who expected to be a witness in such a case as this, as it would be if the examination were for the purpose of obtaining life insurance; and the surgeon's evidence is too often composed largely of impressions or conclusions produced by the declarations and conduct of the patient. In this case, the existence of the injury could not be discovered without such declarations and conduct of the plaintiff, except so far as his general appearance might indicate such an injury as that claimed by him.

The rule of law, as to such officers as the trustees, is well stated by Justice Sheldon in these words: "They are bound to

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exercise ordinary care and diligence to keep them (sidewalks) reasonably safe." *Rockford v. Hildebrand*, 61 Ill., 157. The omission of the word "reasonably" might, perhaps, have improved the statement. The duty is to keep them safe. In the attempted discharge of the duty, ordinary care and diligence only are necessary, and if such be bestowed, there is no liability, though the sidewalks may not be reasonably safe. The adverb reasonably, whatever it may originally have meant, as now used, qualifies the condition of things as well as the conduct of persons. One of its definitions is, "in a moderate degree, not fully, moderately, tolerably" (Webster). The statement that a horse was reasonably or moderately safe, or a reasonably or tolerably good one, would be allowable.

In some cases it has been held that if it appear that substantial justice has been done, courts should not reverse, if the instructions on both sides, taken as a whole, average about right. In cases where there may be doubt whether substantial justice has been done, each instruction of appellee or defendant in error must state the law correctly, or there should be a reversal. In a case where the sympathy of the jury was on one side there would be danger that they would not stop to average, but, that out of the given instructions on both sides, they would select those in accordance with their sympathy and not attach as much weight to the others as they were legally entitled to. In a case like this, we are disposed to consider as good authority *Chicago & Alton R. R. Co. v. Murray*, 62 Ill. 326; *Baldwin v. Killian*, 63 Ill. 550; *Ill. Cent. R. R. Co. v. Maffit*, 67 Ill. 431; *C. B. & Q. R. R. Co. v. Payne*, 49 Ill. 449, and other cases to the effect that each instruction must be right.

The fifth instruction for appellee concludes with the statement that "It makes no difference for the purposes of this suit whether said sidewalk was constructed by the defendant or a private property holder, and the jury may consider said sidewalk the same as though it was constructed by the defendant." It is not entirely clear whether this sidewalk was built prior or subsequent to the passage on Feb. 24, 1859, of the special charter of the village; probably, however, after. The evidence

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is that it was built in 1858 or 1859. Conceding that it was the duty of the trustees to oversee and supervise the construction, as the property owner had the right to build, there might be a difference between actually building and overseeing as to what defects would indicate want of ordinary care and diligence. And in *Rockford v. Hildebrand*, *supra*, it is expressly said that "As the city did not construct the sidewalk, notice of its condition was requisite to charge the city with liability." There is certainly some difference between a case where the village constructed the sidewalk and one where it did not, and it was error to say there was none whatever. The main difficulty, however, is about the other four instructions, which are as follows, viz:

1. "The jury are instructed by the Court that the defendant under its special charter and also under its organization, under the general law, had the power to construct and maintain sidewalks along its streets, and also it was its duty to see that such sidewalks were constructed in a reasonably safe manner for public use, and when so constructed to keep them in repair so as to be reasonably safe for the public. And if the jury believe from the evidence that the plaintiff, while exercising due care on his part, received injury in consequence of the neglect of duty aforesaid by said defendant, either in the construction of the sidewalk in controversy or keeping it so in repair, then the jury should find their verdict against the defendant and assess the plaintiff's damages at such sum as the evidence in the case may warrant, not exceeding, however, the sum of ten thousand dollars, claimed in the declaration."

2. "The jury are instructed by the court that if they believe from the evidence, that the sidewalk in question in this suit was out of repair at the time of the alleged injury, and had so remained for an unreasonable length of time before the time of the alleged injury to the plaintiff, then no actual notice to the defendant was necessary, but the law will presume notice to the defendant in such case. And if the jury believe, from the evidence, that the plaintiff while he was upon the sidewalk aforesaid, using due care on his part, was thrown down with said sidewalk a distance of six or seven feet, and against a

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wall, and was thereby injured in consequence of the said sidewalk being so out of repair, then the jury should find their verdict for the plaintiff, and assess his damages at whatever sum the evidence in the case justifies, not exceeding, however, the sum of ten thousand dollars claimed in the declaration."

3. "The jury are instructed by the court that where a sidewalk is constructed in an improper and negligent manner, no notice of its condition is necessary to make the village liable for the injury, as it is the duty of the village to take notice of the condition of its own sidewalks when they are so defectively and improperly constructed. And if the jury believe from the evidence that the sidewalk in question was constructed in a negligent and improper manner, and that while the plaintiff was passing over or standing upon said sidewalk, using due care, said sidewalk gave way, fell, thereby throwing the plaintiff violently to the ground and against a stone wall and greatly injuring him, then the jury should find the defendant guilty and assess the plaintiff's damages at whatever the evidence in the case warrants, not exceeding however the amount claimed in the declaration, and in assessing the plaintiff's damages, the jury may take into consideration, the plaintiff's loss of time, expenses incurred in being cured, pain and suffering undergone, and any permanent injury to the person as proper elements of damages, so far as the same may have been established by the evidence."

4. "The jury are instructed by the court that if they believe from the evidence that the injury alleged to have been sustained by the plaintiff in consequence of the defective construction of the sidewalk of the defendant, was the combined result of an accident and of a defect in the construction of the sidewalk, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet if the jury believe, from the evidence, that there was no fault or negligence on the part of the plaintiff, and the accident was one which common prudence and sagacity on his part could not have been foreseen and provided against, the jury should find the defendant guilty, and assess the plaintiff's damages at whatever the evidence warrants, not exceeding, however, the amount claimed in the declaration."

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The statement in the first instruction, that it was the duty of the village to see that the sidewalk was constructed in a reasonably safe manner, and that when so constructed it was to be kept in repair so as to be reasonably safe without the insertion after the word "duty," and before the words "to" of the words "to exercise ordinary care and diligence," was well calculated to mislead the jury for reasons before stated. This, however, is not the only difficulty. After stating that such was the duty, it is said that if the jury believe, from the evidence, that the plaintiff, while exercising due care on his part received injury in consequence of the neglect of the duty aforesaid by said defendant, the verdict should be for plaintiff.

Here are two assumptions; one that plaintiff was careful, and the other that defendant had neglected its duty. The first is unimportant because there was no conflict in the evidence, the other very important because there was a serious conflict, as to whether ordinary care and diligence had not really been exercised. It was a very easy matter to have avoided misconstruction by the jury by saying simply that it was the duty of the village to exercise ordinary care and diligence in constructing sidewalks, and in repairing them when constructed.

The second instruction is still more imperfect. It is to the effect that if the sidewalk were out of repair for an unreasonable length of time and if the plaintiff were thereby injured the village was liable, no matter what the measure of its care and diligence may have been to discover and remedy the difficulty, nor is it made material to what extent it was out of repair. The law is well settled that it is not the absolute duty of municipalities to discover and remedy defects in sidewalks, but only to use ordinary care and diligence to do so. *Town of Grayville v. Whittaker*, 85 Ill. 439, and other previous cases. The facts in this instruction may exist and yet there may have been ordinary care and diligence. After lapse of reasonable time, notice of the defect may be implied, and yet the defect be one which ordinary care and diligence would not require to be repaired. There are no perfect sidewalks. It is with them as with men. There are none without some defects.

The third instruction creates liability, if the sidewalk were

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negligently and improperly constructed by the lot owner, though there was no notice to the village authorities; and what has been said about the fifth is applicable to this one. Nor is mere neglect, however slight, enough to make liability. Unless it amount to a want of ordinary care and diligence, it is not neglect enough.

In the fourth instruction the jury are told that if the injury, alleged to have been sustained in consequence of the defective construction of the sidewalk, was the combined result of an accident and a defect of construction, and there would have been no damage but for the defect, then the defendant was guilty, and the jury should so find. That is, if there were a defect of construction, and if appellee were injured, there would be liability without even the slightest negligence on the part of the appellant. That this is incorrect, see *Shearman and Redfield on Negligence*, § 147. What this supposed combination of accident and defect means, under the evidence in this case, is difficult to understand. The jury could never have known exactly what the idea intended to be conveyed was. They may have construed it to mean that the plaintiff, having met with an accident on the defective village sidewalk, ought to have some relief and that the village treasury was the most appropriate place for it to come from. If the idea intended, as is probable, was that if the fall of the sidewalk was partly owing to accident and partly to the negligence of the defendant, the jury should find for the plaintiff, then it was wrong. The admixture of accident might have been enough to dilute the negligence below the standard of ordinary care and diligence.

It was improper also to inform the jury four different times that the plaintiff claimed ten thousand dollars, and to caution them as many times that they should be careful to allow no more. Though not perhaps alone enough for a reversal, the jury may well have supposed there was some urgent necessity for restraining them, so they should not give more. And they might also conclude that plaintiff would never have put in so large a claim unless his injury was quite serious. See *C. R. I. & P. R. R. Co. v. Austin*, 69 Ill. 426.

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For the reasons mentioned we think there should be another trial. The judgment is therefore reversed and the cause remanded.

Reversed and remanded.

PATRICK FINN.

v.

JOHN FINN.

PLEADING.—To an action declaring in the common counts for money paid, etc., the defendant pleaded that the supposed cause of action was for a one-third part of certain judgments paid by plaintiff, which judgments were rendered against said defendant and others in vacation upon certain promissory notes with warrants of attorney, and that at the time of executing the notes and warrants of attorney the defendant was a minor, etc. *Held*, LELAND, J., dissenting, that the declaration being upon an implied promise to pay his proportion of such judgments the plea was a sufficient answer to the declaration, though not averring infancy at the time of the promise alleged in the declaration.

ERROR to the Circuit Court of La Salle county; the Hon. JOSIAH McROBERTS, Judge, presiding. Opinion filed May 2, 1879.

Mr. G. S. ELDRIDGE, for plaintiff in error: That a power of attorney executed by an infant is voidable merely, cited *Hastings v. Dollarhide*, 24 Cal. 195; *Hardy v. Waters*, 38 Me. 450; *Kemp v. Cook*, 18 Md. 139; *Ashton v. Langton*, 30 E. C. L. 567; *Cole v. Pennoyer*, 14 Ill. 158; *Reid v. Degener*, 82 Ill. 508; *Tyler on Infancy and Coverture*, § 18.

In some cases it has been held void: *Saunderson v. Marr*, 1 H. Bl. 75; *Knox v. Flack*, 22 Penn. 33; *Fonda v. Van Horne*, 15 Wend. 403; *Laurence v. McArter*, 10 Ohio 37; *Bennett v. Davis*, 6 Cow. 393.

As to the force and effect of judgments by confession: *Lake v. Cook*, 14 Ill. 353; *Bush v. Hanson*, 70 Ill. 480; *Osgood v. Blackmore*, 59 Ill. 261.

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A plea of infancy is a personal one and may be waived; Blake v. Douglass, 27 Ind. 416; Simmons v. McKay, 5 Bush. 25; Beaubien v. Hamilton, 3 Scam. 215; Mains v. Cosner, 62 Ill. 465; Freeman on Judgments, 39, 102, 151.

Messrs. RICHOLSON & SNOW, for defendant in error; as to the contracts of infants, cited Metcalfe on Contracts, 111; Robeson v. Works, 56 Me. 102; Addison on Contracts, 113.

A judgment rendered by a court without having jurisdiction of the person is void: Wumberly v. Hurst, 33 Ill. 166; Wight v. Wallbaum, 39 Ill. 555; Eltson v. Chicago, 48 Ill. 514; Mulford v. Stalzenbach, 46 Ill. 303; Huls v. Buntin, 47 Ill. 396; White v. Jones, 38 Ill. 160; Miller v. Handy, 40 Ill. 449; Campbell v. McCahan, 41 Ill. 46; Goudy v. Hall, 30 Ill. 109; Clark v. Little, 41 Iowa, 497; McAuley v. Hargroves, 48 Ga. 50.

LELAND, J., dissenting. To a declaration containing the common counts, of which the one in the usual form for money paid, laid out and expended, is the only one it is necessary to notice, the following plea was pleaded among others:

2. "And for a further plea in this behalf, defendant says *actio non*, because he says that this suit is brought for the sole and only purpose of recovering from this defendant the one-third part of two certain judgments alleged to have been recovered in the County Court of this county, in vacation after December term, A. D. 1867, against said plaintiff, which said judgments plaintiff claims to have paid and satisfied in full. Defendant avers that both of said judgments were entered up by the clerk of said court in the vacation after the said December term, 1867, without any service of process against this defendant, or of notice of any kind whatever by virtue of, or by the supposed authority of two certain promissory notes, with a power of attorney attached to each of said notes; said notes being what are known and described as judgment notes, in and by which the makers thereof assume to waive service of process, and to authorize any attorney-at-law to confess judgment in any court of record, either in term time or in vacation, in favor of the

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payees or the assignees thereof for the amount of such notes respectively and for certain attorney's fees; which said notes and each of them, were executed by plaintiff, one Richard Finn, and this defendant. And defendant avers that at the time he executed said notes and powers of attorney, and each of them, he was an infant under the age of twenty-one years, to wit: of the age of eighteen years, to-wit: at the county aforesaid; and defendant therefore avers that said notes and the powers of attorney attached thereto, and the said judgments rendered thereon, were and are, as to this defendant, absolutely void in law; and this defendant is ready to verify; wherefore he prays judgment, etc."

There was a bill of particulars filed by plaintiff, describing the judgments paid by him, as having been rendered against him, and defendant and another person, and claiming one-third of the defendant, and the plea seems to be not only to the declaration but also to the bill of particulars, and is hardly intelligible without the latter. The bill of particulars, however, describes three judgments, the plea mentions two only.

There was a demurrer overruled to the plea, and judgment for the defendant, which plaintiff seeks to reverse.

Without examining the question whether the judgments mentioned in the plea should be considered valid until reversed or vacated or absolutely void, but treating them as absolutely void, and a payment of them as a mere payment of the notes it seems to me that this plea instead of presenting a defense to the money paid on the judgments admits a cause of action. It is not denied and, therefore, it is admitted that at the time when the promises in the declaration mentioned were made the defendant was an adult. "No distinction exists in pleading between an implied promise and an express one. It is true that in evidence the law in many cases implies from certain facts that a promise has been made, but in pleading, the supposed promise itself should be alleged." 1 Chitty's Pl. 302. It may, therefore, be safely said that all alleged promises should always be considered express ones and admitted as such.

The allegation, therefore, in the declaration is that plaintiff paid the judgments, or amount due on the notes, at the request

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of a then adult defendant, who was one of the three makers of the notes, and that thereupon this adult defendant expressly promised plaintiff to pay him one-third of the amount paid. There is not only no statement in the plea that "defendant at the time of making the said several supposed promises and undertakings in the declaration mentioned was an infant," etc., as in the form, 3 Chitty's Pl. 909, but it substantially appears, on the face of the plea, that defendant was then an adult.

In pleading in suits at law, however, that which is not denied is admitted. It is therefore admitted that the promise in the declaration was an express one of an adult defendant. There is not even an argumentative denial of the promises of the defendant to pay plaintiff the one-third of the money paid on the judgments, by stating that those in the promissory notes were the only promises made by defendant. Of what consequence is it then whether the defendant was a minor or not at the time of the making of the promissory notes? His express promise as an adult to pay the one-third which, at his request the plaintiff had paid for him, was as valid to plaintiff surely as an express promise to a payee by an adult to pay a note which he had given while a minor would be to such payee.

Would a repetition of these admitted facts in a replication, make plaintiff's case any better? What is the necessity for the same party saying the same thing twice? Would the following replication by plaintiff be any better than the allegations in the declaration: "*Precludi non*, because he says that said defendant, after he became twenty-one years of age, requested the plaintiff to pay for him the one-third, etc.; that plaintiff did so at such request, and that thereupon the defendant expressly promised to pay him the amount thus paid." It seems to me that upon the well settled rules of pleading, conceding the declaration and plea both to be true, nothing was left to be done, if there were no other issue, except to assess the plaintiff's damages as to the amount paid for defendant by plaintiff on the judgments.

It may be that the statement in the plea "that this suit is brought for the sole and only purpose of recovering from this defendant the one-third part of two certain judgments, etc.,"

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amounts to an argumentative general issue to all the other counts, and to all causes of action which might be shown under the money paid, laid out and expended count, except the money paid by plaintiff on the judgments, which would have required the plea to have been specially demurred to for duplicity. 1 Chitty, Pl. 528. If the above statement in the plea be equivalent to the usual one that it was plaintiff's only cause of action, but which is not really said, then it would be argumentatively saying that defendant did not undertake and promise, except to pay the amount paid by plaintiff on the judgments, and would, *pro tanto*, be a general issue to the declaration.

If plaintiff, instead of conceding the plea to be true by demurring, had put in the foregoing special replication, and having other causes of action had desired to add a *similiter* to the general issue part of the plea, it perhaps would have been as artistic as the plea to have said "as to so much of said plea as amounts to the general issue, and of which defendant may be supposed to have put himself upon the country, plaintiff doth the like."

For the reasons aforesaid I think the demurrer should have been sustained to the plea, and that the judgment of the court below should be reversed.

FERDINAND W. PECK

v.

THE COALFIELD COAL COMPANY, use, etc.

1. LIABILITY OF STOCKHOLDERS.—In order to render a stockholder liable under the statute to the extent of his unpaid stock for the debts of the corporation, proceedings must be instituted against him at the same time that action is begun against the corporation on the principal cause of action.

2. SPECIAL REMEDY.—A general liability created by statute, without a remedy, may be enforced by any appropriate common law action, but when the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone must be employed.

APPEAL from the Circuit Court of Will county: The Hon.

Peck v. Coalfield Coal Co.

FRANCIS GOODSPEED, Judge, presiding, Opinion filed May 6, 1879.

Messrs. COOPER, PACKARD & GURLEY, for appellant; that where the charter of a company does not prohibit payment of capital stock in anything but money, it may be paid for in something else, cited *Phelan v. Hazard*, 6 Cent. Law Jour. 109; *Pell's case* L. R. 5 Ch. 11; *In re Boglan Hall Co.* L. R. 5 Ch. 346; *Maynard's case* L. R. 9 Ch. 60; *Schroeder's case*, 11 Eq. 131; *Cleland's case*, 14 Eq. 387; *Lichell's case*, L. R. 3 Ch. 119; *Savage v. Ball*, 17 N. J. 142; *Smith v. N. A. etc. Co.* 1 Nev. 423; *Goodrich v. Reynolds*, 31 Ill. 490; *Spence v. Iowa Valley Co.* 36 Iowa, 407; *In re China, etc. Co.* L. R. 4 Ch. 772; *Carr v. Le Fevre*, 27 Pa. St. 413; *Foreman v. Bigelow*, 7 Cent. Law Jour. 430.

Stockholders' liability can only be enforced in the manner provided by the statute: *Pollard v. Bailey*, 20 Wall. 527; *Erickson v. Nesmith*, 4 Allen, 236; *Baker v. Backus*, 32 Ill. 82; *Tarbell v. Page*, 24 Ill. 47; *Steele v. Dunne*, 65 Ill. 298; *Taylor v. New Eng. M. C.* 4 Allen, 579; *Pease v. Underwriters' Union*, 1 Bradwell, 287.

A stockholder cannot be made liable for debts of the corporation incurred after he ceases to be a stockholder: 1 *Redfield on Railways*, 197; *Angell and Ames on Corporations*, § 534; *Handrahan v. Cheshire Iron Works*, 4 Allen, 396.

The liability of the stockholder is extinguished by a judgment against the corporation, where the person was not summoned and had ceased to be a stockholder before judgment: *Sampson v. Clark*, 2 Cush. 173; *Woodbury v. Perkins*, 5 Cush. 86; *Liddale v. Rawcliffe*, 1 Cr. & M. 490; *Thompson v. Hewitt*, 6 Hill, 254; *Byers v. Franklin Coal Co.* 106 Mass. 137; *Cambridge Water Works v. Somerville Dyeing Co.* 4 Allen, 239; *Erickson v. Nesmith*, 4 Allen, 233; *Mason v. Cheshire Iron Works*, 4 Allen, 398.

The remedy is in equity under the statute relating to insolvent corporations, against the corporation and stockholders for the benefit of all the creditors: *Richardson v. Aikins*, 87 Ill. 138; *Turpin v. Haines*, 10 Chicago Legal News, 74.

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A corporation formed under the act of 1872 is not bound upon contracts made previous to incorporation: *Western Screw Co. v. Cousley*, 72 Ill. 531; *R. R. I. & St. L. R. R. Co. v. Sage*, 65 Ill. 328.

Forfeited stock dissolves the connection of the stockholders, whose shares are forfeited with the corporation, and a creditor cannot charge them with the amount unpaid: *Allen v. Montgomery R. R. Co.* 11 Ala. (N. S.) 437; *Macaulay v. Robinson*, 18 La. An. 619.

The sworn certificate of the officers of a company that the capital stock has been paid in, is conclusive evidence for the stockholders so far as to exempt them from personal liability for debts of the company: *Stedman v. Eveleth*, 6 Met. 114.

The judgment obtained against the company without notice to the stockholders, cannot be *res adjudicata* as to him: *Pierce v. Carleton*, 12 Ill. 358; *Moss v. McCulloch*, 5 Hill, 131.

A stockholder is not liable upon a claim for damages against a corporation, arising from negligence: *Heacock v. Shuman*, 14 Wend. 58; *Cable v. McCune*, 26 Mo. 371; *Cable v. Goty*, 34 Mo. 573.

The non-joinder of one of several joint debtors, is fatal to the right of plaintiff to recover against those proceeded against by garnishee process: *Rex v. Elliott*, 1 N. H. 144; *Hudson v. Fisk*, 5 N. H. 538; *Atkins v. Prescott*, 10 N. H. 122; *Weatherwax v. Paine*, 2 Gibbs, 558; *Wellover v. Soule*, 30 Mich. 581; *Pettes v. Spaulding*, 21 Vt. 66; *Wilson v. Allbright*, 29 Greene, 125; *Haskins v. Johnson*, 24 Geo. 625; *Elliott v. Smith*, 2 Cranch, 548; *Jewett v. Bacon*, 6 Mass. 59; *Hutchinson v. Eddy*, 16 Ship. 485.

Mr. GEO. S. HOUSE, for appellee; that where the statute gives a remedy, there must be a strict compliance with its provisions, cited *Gray v. Coffin*, 9 Cush. 192; *Pollard v. Bailey*, 20 Will, 527; *Tarbell v. Page*, 24 Ill. 47.

As to the liability of a stockholder to a creditor: *Culver v. Third Nat. Bank*, 64 Ill. 528; *Corwith v. Culver*, 69 Ill. 502; *Richardson v. Akin*, 87 Ill. 138.

In the construction of statutes, the intention of the legislature

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may be collected from the cause or necessity of the act: *Wood v. Blanchard*, 19 Ill. 38; *Castner v. Walford*, 83 Ill. 179.

A statute should be construed, if possible, so that no clause or sentence shall be superfluous or insignificant: *Dicker v. Hughes*, 58 Ill. 41; *City of Springfield v. Edwards*, 84 Ill. 632.

PILLSBURY P. J., On the 7th day of November, A. D. 1877, H. Leroy Thayer, for whose use this proceeding is prosecuted, recovered a judgment in the Will Circuit Court against the nominal plaintiff herein for \$5,963.20, by default, and on the 27th day of December of the same year he sued out of said court a garnishee summons against appellant, Peck, as a stockholder in said company.

The appellant was not summoned at the the time the suit was originally commenced against the company, but the basis of this proceeding is, that Peck was owing the company upon stock subscribed by him, which he had not fully paid up, and it is sought by this proceeding, instituted under the act relative to garnishment to obtain a judgment against him to satisfy that obtained by Thayer against the company. Interrogatories were filed and answered by the garnishee in the court below, and upon a hearing, judgment was rendered against the garnishee, and he appeals.

By the common law, a stockholder was not liable for the debts of the corporation, and such liability exists only by virtue of some statute. The eighth section of the statute of this State, entitled Corporations, reads as follows:

“Every assignment or transfer of stocks, in which there remains any portion unpaid, shall be recorded in the office of the Recorder of Deeds of the county within which the principal office is located, and each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him, to be collected in the manner herein provided. No assignor of stock shall be released from any such indebtedness by reason of any assignment of his stock, but shall remain liable therefor jointly with the assignee until the said stock be paid in full. Whenever any action is brought to recover any indebtedness against the corporation,

it shall be competent to proceed against any one or more stockholders at the same time to the extent of the balance unpaid by such stockholders upon the stock owned by them, respectively, whether called in or not, as in case of garnishment. Every assignee or transferee of stock shall be liable to the company for the amount unpaid thereon to the extent, and in the same manner as if he had been the original subscriber."

It is admitted by counsel for appellee that it is only by virtue of this section that appellant can be held liable, and claims that this proceeding is instituted under that section. We think the language of this section fairly construed means that a party can at the time he commences his action against the corporation have a summons issued in the nature of a garnishee process against any one or more of the stockholders of such corporation, and whose subscription to the capital stock has not been fully paid, warning them of the pendency of such suit, and by the service of such summons the creditor would prevent such stockholder from making payment to the corporation of any amount that may be due upon his subscription. We are inclined to the opinion that in order to hold the stockholder liable at law it is essential that such writ to the stockholder should be issued at the same time the suit against the corporation is commenced, as that appears to be the fair construction of the statute.

In Pollard v. Bailey, 20 Wall. 527, the Supreme Court of the United States held that:

"The individual liability of stockholders in a corporation for the payment of its debts, is always a creature of statute. At common law it does not exist. The statute which creates it may also declare the purposes of its creation and provide for the manner of its enforcement. * * * The liability and the remedy were created by the same statute. This being so, the remedy provided is exclusive. A general liability created by statute without a remedy may be enforced by any appropriate common law action. But when the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone, must be employed."

Speaking on the same point, the Supreme Court of Massachusetts says:

“When the statute confers a right and prescribes a remedy, that particular remedy, and that only can be pursued.” (Per Dewey, J., in *Ericksen v. Nesmith*, 4 Allen, on p. 236.)

Our own Supreme Court also say, in *Baker v. Backus*, 32 Ill. on p. 99:

“The stockholders in such a corporation can only be responsible in the mode prescribed in the act under which they became associated as a corporation. They are not individually liable, except under the circumstances and for the time specified in the act of incorporation.”

Under these authorities, we think the remedy provided by the eighth section is exclusive and must be pursued by the creditor if he would hold the stockholder at law.

The appellee in this case not having pursued such course, we think he cannot recover.

This proceeding being an ordinary garnishment after return of execution *nulla bona*, there is another reason shown by this record why the judgment cannot be sustained. It is a well settled rule of law in our State that judgment cannot be rendered against the garnishee in favor of the judgment debtor for the use of the execution creditor, unless the judgment debtor could recover in an independent suit against the garnishee. *Richardson et al. v. Lester et al.* 83 Ill. 55.

It appears in this case that the capital stock of the corporation was fully paid by the stockholders, appellant among the number, by deeding to the coal company about 1,000 acres of coal land, which was accepted by the company in full payment of all stock subscribed.

It is quite evident if the company was to bring an action against appellant upon his subscription to the capital stock, the conveyance of the land could be pleaded as full payment therefor, and upon the proofs in this record we fail to see how a recovery could in such case be sustained in favor of the company.

We are aware that the rule in this country in equity is, to treat the capital stock as a trust fund for the payment of debts

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owing by the corporation, and have no desire to limit the the operation of so beneficial and just a rule, but if a party pursues a legal remedy in the name of the corporation for his use, under which proceeding the liability of the garnishee to the company is the measure of his liability to the creditor, he can have no relief, unless he can show that the garnishee is indebted to the nominal plaintiff.

Judgment reversed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—MARCH TERM, 1879.

SUSAN MARTINS
v.
CHARLES GREEN.

JUDGMENT NOT SUPPORTED BY THE EVIDENCE.—Appellee claimed to recover of appellant for goods sold to one C. by her authority. The burden of proof was upon appellee to show that appellant authorized the purchase of the goods, and failing to establish that fact by a fair balance of testimony the judgment is reversed.

APPEAL from the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. PLINY B. SMITH, for appellant.

Mr. ADOLPH MOSES, for appellee; that the finding of a court has the same force as the verdict of a jury, and there being testimony to sustain the judgment, it should not be reversed, cited Bishop v. Busse, 69 Ill. 403; Wiggins Ferry Co. v. Higgins, 72 Ill. 517; T. W. & W. R. R. Co. v. Elliott, 76 Ill. 67; Plummer v. Rigdon, 78 Ill. 222; Miller v. Balthasser, 78 Ill. 202; McClelland v. Mitchell, 82 Ill. 35; Nimmo v. Kuykendall, 85 Ill. 476.

MURPHY, P. J. In September, 1876, Theodore Martins, in business at No. 46 North Clark street, Chicago, as a grocery man, departed this life, leaving him surviving his widow, the appellant. At the time of his decease Charles Martins, his brother, was in his employ as clerk or assistant in and about such business. It is disclosed by the record, that after the decease of Theodore Martins, Charles, his brother, continued the business in the name of deceased, without any purchase of the stock in trade until the 13th day of January, 1877, when the appellant, having been appointed administratrix of her husband's estate, executed a bill of sale of said stock and fixtures to Charles Martins, her late husband's brother, and took a chattel mortgage back to secure the payment of the purchase price, \$538.98; that at some time, between the decease of Theodore Martin and the 13th day of January, 1877, Charles Martins purchased of appellee and caused to be delivered at the store, goods of the value of \$152.20, the amount of the recovery in the court below. The question raised is whether these goods were purchased by Charles Martins as the agent of the appellant, with sufficient authority from her to bind her by such purchase, or whether he purchased them on his own account. It is claimed by appellee that the business was carried on from September, 1876, to the 13th day of January, 1877, by the appellant on her own account, and that Charles Martins was her agent for the purpose of managing and conducting the same; and as a consequence had her authority as an incident to such general power to purchase the goods in question. It is claimed by the appellee that the fact that a bill of sale was given by appellant of the goods then in the store, and a chattel mortgage taken back on the 13th day of January, 1877, tends to show that the business had been conducted by her from the decease of her husband up to that time, and that when taken in connection with the testimony of young Jacobson, when he was employed by Charles Martins to assist in the business, that appellant told him to tend the store, sell goods, drive the horse, etc., and that appellant used to come into the store frequently and look over the books, and get provisions, and that several times she got money—makes a case in which Charles Martins

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would be legally authorized to bind the appellant by his purchase of goods.

If this were all the testimony on the question, it might make a *prima facie* case, but on the part of appellant it is claimed she had no interest whatever in running the business; that on the decease of her husband she gave the business over to her brother-in-law, Charles Martins, who ran the same on his own account and for his own benefit.

She testifies that she had no interest in the business, and as a consequence Charles had no authority from her to buy the goods in question on her account; that she did not know what was bought for the store, or anything about the condition of the business; that she never derived any profit from the business, or contributed anything to it, or exercised any control over it. That true it was she obtained provisions from the store for the house, but that they were charged to her on the books. Denies ever having got any money from Charles, except \$5.00 to apply on the board of himself and his clerk, Jacobson, and \$140.00, which she let him have when he went into the store, and also such moneys as were due to her husband at the time of his decease, and which Charles had collected and did not pay over to her; denies ever looking over the books at any time when in the store; denies ever giving Jacobson the direction what to do, as testified to by him; that she never knew appellee until after this suit was commenced; that she asked him why he had not told her about it before, to which appellee replied: because Charles Martins did not want him to tell her anything about it. She testifies that she told Charles Martins not to run the business in the name of her deceased husband, and he told her it was none of her business. This was substantially all the testimony in the case.

It will be thus seen that the testimony of Jacobson to the alleged principal acts of the appellant tending to show that she exercised acts of ownership and proprietorship of the store, is flatly contradicted and explained away by the testimony of the appellant. She denies having given him any direction whatever about his duties at the store, and explains what money she received there, and testifies that such provisions as she got

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there were charged to her on the books, same as any other customer; and upon these material points, if she is entitled to credit, the testimony is evenly balanced. She is unimpeached, and apparently entitled to credence, and the burden being on the appellee to show authority in Charles Martins to bind the appellant, we think this proof fails to show it.

Her testimony is uncontradicted except as to the directions Jacobson says she gave him about his duties, and her examination of the books.

In the light of her explanation of the money and provisions received, and her denial of the balance of Jacobson's testimony, it is not easy to perceive by what evidence the verdict is sustained. We think the evidence entirely fails to make a case, and that it was error for the court to find and to give judgment for the appellee on the evidence submitted, and for which the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

ROBERT FERGUS ET AL.

V.

THE CLEVELAND PAPER COMPANY.

PRACTICE—AFFIDAVIT OF MERITS—PLEA DENYING JOINT LIABILITY.—Appellants, being sued as copartners, with their plea of the general issue, filed pleas, verified by affidavit, denying a joint liability. On motion, these pleas were stricken from the files for want of an affidavit of merits, and judgment rendered for the plaintiff as by default. *Held*, that the affidavits verifying the pleas denying a joint liability showed a defense to the entire cause of action, and were a sufficient compliance with the statute requiring defendants to file an affidavit of merits with their pleas.

APPEAL from the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Mr. J. D. ADAIR, for appellant; that the affidavit was sufficient, and the court erred in striking the pleas from the files,

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cited Rev. Stat. 1877, 738, §§ 29, 36, 37; 1 Gross' Stat. 270, § 12; 2 Gross' Stat. 288, § 123; Bank of North America v. C. D. & V. R. R. Co. 82 Ill. 493; Harrison v. Willett, 79 Ill. 482.

Messrs. CONGER & GORTON, for appellee; that the affidavit should state that the defendant believes he has a good defense to the suit upon the merits, to the whole or a portion of plaintiffs' demand, cited Rev. Stat. 1877, 739, § 37; Filkins v. Byrne, 72 Ill. 101; Bank of Chicago v. Hull, 74 Ill. 106; Honore v. Home Nat. Bank, 80 Ill. 489.

Where plaintiff has filed an affidavit of his claim, the defendant must file an affidavit of merits with his plea: Rev. Stat. 1874, 779, § 37.

The language of the affidavit and of the statute are in no sense equivalent: Bank of North America v. C. D. & V. R. R. Co. 82 Ill. 493.

BAILEY, J. This is a suit in assumpsit, brought by the Cleveland Paper Company against Robert Fergus and four others, upon an account for goods, wares, merchandise etc. In the declaration, the plaintiff seeks to charge the defendants jointly as co-partners, doing business under the name of The Fergus Printing Company. With the declaration, the plaintiff filed an affidavit in accordance with the provisions of section 36 of the Practice Act, showing the nature of its demand, the amount due thereon, etc. Each of the defendants appeared and plead non assumpsit, and also filed a special plea verified by affidavit, denying his joint liability with the other defendants upon the promises and undertakings set out in the declaration. No other affidavit of merits being filed, on motion of the plaintiff, the pleas were stricken from the files, and judgment rendered against the defendants by default for \$411.84. The errors assigned call in question the decision of the court, striking the pleas from the files and rendering judgment by default.

It is provided by section 36 of the Practice Act, that if any plaintiff in any suit upon a contract express or implied, for the payment of money, shall file with his declaration an affidavit, showing the nature of his demand, and the amount due him

from the defendant, after allowing to the defendant all just credits, deductions and set-offs, if any, he shall be entitled to judgment as in case of default, unless the defendant shall file with his plea an affidavit, stating that he verily believes he has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand, and if a portion, specifying the amount according to the best of his judgment and belief.

The only question to be considered, is whether the defendants' affidavits verifying their pleas, denying joint liability, are a substantial compliance with the provisions of the statute. The language of the affidavits is manifestly different from that employed by the statute, yet we think the facts stated are broader, and more than an equivalent to those required by the statute. The pleas denying joint liability, if true, are a defense to the entire suit, and the affidavits verifying the pleas, state in substance absolutely, and not upon the defendant's belief merely, that they have such defense to the entire suit. The statute does not require the nature of the defense to be set out in the affidavit. These sworn pleas however, not only show the existence of a defense, but indicate its precise nature.

Very considerable warrant for the view we have taken, may be derived from the decision of the Supreme Court in *Bank of North America v. Chicago, Danville and Vincennes Railroad Co.* 82 Ill. 493. In that case the declaration contained a special count on a promissory note and the common counts, and a sworn plea was filed, denying the execution of the note set up in the special count. The plea was stricken from the files and the Supreme Court sustained such action, not upon the ground that the affidavit failed to follow the language of the statute, but that the sworn plea was no defense to the common counts, and as the entire cause of action might have been proved under the common counts, the defense thus presented did not necessarily go further than to affect the character of the evidence admissible in support of the plaintiff's action. The conclusion is fairly deducible from the opinion, that had a sworn plea presented a defense to the entire declaration, it would have been held to be a substantial compliance with the statute. We

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think the court erred in striking the pleas from the files, for which error the judgment must be reversed and the cause remanded.

Judgment reversed.

DAVID PRESTON ET AL.

v.

J. BLACKBURN JONES.

1. PAYMENT BY ORDER UPON A THIRD PARTY.—Appellee being sued as indorser of a promissory note, pleaded payment by delivery and acceptance of an order for the amount upon a third party. It appeared that when called upon by appellants' correspondent for payment, he gave the order to him to be sent to appellants. The order was sent, and appellants having failed to collect the amount due on it, retained it till it was produced on the trial: *Held*, that these facts raised no presumption that appellants received the order in full satisfaction of the amount due on the note.

2. EVIDENCE—CORRESPONDENCE.—Appellee, in delivering the order to appellants' correspondent, made him his agent in transmitting the proposition for settlement to them, and the correspondence between such agent and appellants, regarding the transaction, was admissible, as tending to show whether or not the order had been received and accepted by appellants in satisfaction of their claim.

ERROR to the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Mr. MORTON CULVER, for plaintiffs in error; argued that if a bank to whom paper is sent for collection, receives anything else than money, it is no payment; and if it takes anything else it becomes the agent of the payor, and its acts do not bind the sender unless specially notified, and cited *German American Bank v. Nat. Bank of Missouri*, 11 Chicago Legal News, 97; *Nolan v. Jackson*, 16 Ill. 272; *Vickery v. McClellan*, 61 Ill. 311; *U. S. Life Ins. Co. v. Advance Co.* 80 Ill. 549.

Messrs. STEELE & JONES, for defendants in error; that if a guarantor signs after delivery of the note to the payee, a new

consideration must be shown for the guaranty, cited Parkhurst v. Vail, 73 Ill. 343; Pahlman v. Taylor, 75 Ill. 629; Boynton v. Pierce, 79 Ill. 145; White v. Weaver, 41 Ill. 409.

There was evidence to support the verdict, and it should not be set aside: Varner v. Varner, 69 Ill. 401; T. W. & W. R. R. Co. v. Moore, 77 Ill. 217; Clifford v. Lubring, 69 Ill. 410; Chapman v. Burt, 77 Ill. 337; C. & N. W. R. R. Co. v. Ryan, 70 Ill. 211; McClelland v. Mitchell, 82 Ill. 35.

Plaintiffs in error, on affidavit being made for a continuance, admitted that the witnesses, if present, would swear to the facts stated, and such facts were read to the jury. This was not the reading of *ex parte* affidavits, but a statement of admitted facts: Rev. Stat. 740, §§ 44, 45; Utley v. Burns, 70 Ill. 162; C. & N. W. R. R. Co. v. Clark, 70 Ill. 276.

PLEASANTS, J. Plaintiffs in error, who were bankers in the city of Chicago, sued defendant in error as guarantor of a promissory note made to them by W. P. Jones, of March 1, 1876, at five months, for four hundred dollars. The defenses set up were, first, that he endorsed the note after it had been delivered to plaintiffs, and without consideration; and second, that he delivered to them and they received in full satisfaction of his liability, an order of Bartlett Waldron upon Hagar Waldron, adm'r, &c., for four hundred and forty-five dollars.

Upon the first issue it appeared that the note was for a balance due on a previous one, for which it was to be taken as an extension only when and upon condition that defendant should guarantee it, and that the old one was not surrendered or canceled nor the new one absolutely accepted until the latter was so guaranteed. Whether defendant at the time of his endorsement knew of this understanding between the plaintiffs and the maker was not distinctly shown, but this branch of the defense seems not to have been much relied on. No instruction was asked of the county court, and no question is presented here in reference to it.

Upon the second issue the evidence showed that after the note matured, plaintiffs sent it for collection to Emil Karst, cashier of the Continental Bank of St. Louis, Missouri, where

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defendant then resided; that Karst notified him in the usual form; that defendant called and offered to turn over in satisfaction of the claim against him the order above referred to, saying it was good, and with proper care could be collected; that Karst disclaimed authority to receive it as proposed, and some evidence was introduced tending to show that he agreed to send it to plaintiffs, and if they should decline so to receive it he would return it to the defendant within a week. He did immediately send it to them, but with what proposition or statement, if any, was not proved. It appears, however, that they held it, made some ineffectual effort to collect it, and produced it on the trial. Plaintiffs offered in rebuttal certain letters, testified to be all the correspondence between them and Karst about the order, and particularly one of December 18, 1876, purporting to be signed by him and enclosing said order, but the court, upon objection by defendant, refused to admit them.

We are not advised as to the ground of the objection or of the ruling. The handwriting of Karst was not formally proved, but the witness stated that all of the letters signed "Preston, Kean & Co." were written by him, and those signed "Emil Karst" received in answer to them respectively; and that of December 18 was further authenticated by the order enclosed, which defendant himself testified he delivered to Karst on that day for transmission to plaintiffs. This letter communicates no such proposition as that which defendant says Karst agreed to report. Its language is: "J. Blackburn Jones called to-day and handed in the within order, Bartlett Waldron on Hagar Waldron, Sparta, Ill., for \$445, stating that the same would be paid within forty-five days, proceeds to be applied to the payment of his indorsement note, \$400."

We are of opinion that the evidence introduced failed to make out the defense. Upon this issue, the burden was upon the defendant to show, by a preponderance of evidence, that plaintiffs accepted the order in satisfaction of his liability. Karst had no authority to make any agreement for them in relation to it. The proof, then, as against them, went no further than to show that they received it, and having failed in

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efforts to collect it, produced it on the trial. These facts raise no presumption that they received it in full satisfaction rather than as collateral security; and if they did, it was error to exclude evidence offered and tending to rebut such presumption.

In sending the order to plaintiffs, Karst was the agent of the defendant. Whatever proposition accompanied it was therefore part of the *res gestæ*, even if it was not the proposition of the defendant, and upon one or both of these grounds was admissible. Plaintiffs could not ratify an arrangement made by Karst with the defendant until they knew what it was, and the jury should not have been permitted to presume, merely from his sending and their keeping the order, as stated, that at the time of sending it he reported a particular proposition, especially when the clearest possible proof was offered that he in fact reported a very different one; yet this is about what was done by excluding the letter and giving the second instruction asked by defendant.

The trial resulted in a verdict for him, which the court ought to have set aside for the reasons above given, but refused, and entered judgment thereon against the plaintiffs for costs. Said judgment is therefore reversed and the cause remanded.

Reversed and remanded.

JAMES BUCHANAN

V.

GUSTAV GOEING ET AL.

1. TRESPASS—LEVY OF EXECUTION.—The plaintiff in an execution is responsible for the acts of a constable in making a levy thereunder, only so far as he aids, directs or authorizes them to be done, or approves of them afterwards as done in his name or interest, and if these acts were several, then only for such as he so aids, directs, authorizes or approves.

2. EXCESSIVE LEVY—RECEIPT OF PROCEEDS.—The levy upon the goods of strangers is a trespass, and the plaintiff in execution becomes liable therefor by receiving the amount derived therefrom, which is an approval of the act; but, the goods being in parcels, an excessive levy is a further and inde-

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pendent wrong, not necessarily or naturally growing out of the other. It would have been no less wrongful if the goods had been the property of the execution debtor, yet the mere receipt by the plaintiff in execution, of the amount of his debt, without notice of the excessiveness or extent of the levy, is not a ratification or approval of such excessiveness.

ERROR to the County Court of Cook county; the Hon. MASON B. LOOMIS, Judge, presiding.

Messrs. BANNING & BANNING, for plaintiff in error; that he is not liable for the trespass of the constable beyond the amount he received on his debt, it not being shown that he instigated, directed or approved the trespass, cited *Grund v. Van Vleck*, 69 Ill. 478; *Hyde v. Cooper*, 26 Vt. 558; *Adams v. Freeman*, 9 Johns. *118; *Coe v. Higdon*, 1 Disney, 395.

Plaintiff in error is not liable for an excessive levy which he never authorized or approved: *Freeman on Executions*, §§ 273, 303; 2 *Hilliard on Torts*, 157; 1 *Chitty's Pl.* *86; *Becker v. Dupree*, 75 Ill. 167; *Adams v. Freeman*, 9 Johns *118; *Hyde v. Cooper*, 26 Vt. 557; *West v. Shockley*, 4 Harr. 288; *Princeton Bank v. Gibson*, 20 N. J. 140; *Hopkins v. Smith*, 7 J. J. Marsh, *264; *Clay v. Sandefer*, 12 B. Mon. 338; *Brooks v. Ashburn*, 9 Ga. 302; *Guile v. Swan*, 19 Johns. 382; *Averill v. Williams*, 1 Denio 503; *Coe v. Higdon*, 1 Disney 394; *Kreger v. Osborn*, 7 Blackf. 76; *Berry v. Fletcher*, 1 Dillon, 71.

Having acted in good faith and without malice, plaintiff in error is not liable for exemplary damages: *Hawk v. Ridgway*, 33 Ill. 473; *Gray v. Waterman*, 40 Ill. 522; *Johnson v. Jones*, 44 Ill. 142.

Messrs. SWETT & BATES and Mr. E. R. BLISS, for defendant in error; that plaintiff in error had actual knowledge that the property was held by virtue of replevin proceedings and was bound to know their legal effect, cited *Rhines v. Phelps*, 3 Gilm. 455; *Johnson v. Camp*, 51 Ill. 219; *Jasper v. Purnell*, 67 Ill. 358.

As the jury did not give exemplary damages, plaintiff in error is not prejudiced by instructions given on that point: *Gilson v. Wood*, 20 Ill. 37; *Hessing v. McCloskey*, 37 Ill. 341.

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The question of intent is not involved: Olsen v. Upsahl, 69 Ill. 273; Wolf v. Boettcher 64 Ill. 316; Guille v. Swan, 19 Johns. 381.

A liability may arise by directing or aiding the commission of the act: Snyder v. Brosse, 51 Ill. 357; Develing v. Sheldon, 83 Ill. 390; Wolf v. Boettcher, 64 Ill. 316.

By subsequent ratification, whereby he becomes a trespasser *ab initio*: Page v. Du Puy 40 Ill. 506; Becker v. Dupree, 75 Ill. 167; Haskins v. Haskins, 67 Ill. 446; Herring v. Hop-pock, 3 Duer, 20; Davis v. Newkirk, 5 Den. 92; 1 Chitty's Pl. 80.

In actions of tort, matters of justification must be specially pleaded; Olsen v. Upsahl, 69 Ill. 273; Taylor v. Morrison, 73 Ill. 565; Hahn v. Ritter, 12 Ill. 80.

PLEASANTS, J. This was an action of trespass *quare clau-sum fregit* and *de bonis asportatis*, brought by the defendants in error against the plaintiff in error.

They obtained a verdict for \$933.33, of which \$133.33 was remitted, and the County Court, after overruling a motion for a new trial, rendered judgment thereon for \$800 damages, and for costs.

The material facts are, that plaintiffs below being in possession of a stock of pictures, picture frames, looking-glasses, etc., in a store on State street, and claiming to own the same by virtue of a bill of sale from Joseph Keitz the former proprietor, of whom they had been employees, an execution in favor of the defendant, upon a judgment for \$79, against said Keitz, recovered before a justice of the peace previous to the alleged sale, was duly issued and delivered to constable Worth, who by virtue, or under color thereof, levied upon the goods of the value of \$1000, or more, and sold them as the property of said Keitz, for the aggregate sum of \$450. No part of the proceeds was ever paid over to the plaintiffs, but the defendant received thereof from said constable the amount of his judgment and costs. Other creditors of Keitz had previously levied upon the goods, but plaintiffs had replevied them. Being told by Keitz that plaintiffs owned them, the defendant stayed all proceedings

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looking to the collection of his debt out of them, but being subsequently informed, also by Keitz, that the sale to plaintiffs was only colorable, and that others of his creditors were levying upon them, he communicated these statements to his attorney and directed him to take such steps as he should think proper. While yet in the store, in charge of a custodian under defendant's execution, one of the plaintiffs told him that the goods were theirs and proposed an arrangement for the speedy determination of the question of ownership. Defendant then promised him to meet them at the office of his attorney on the next morning, but failed to appear, and about dark of the same day the constable removed all of the property from the store. Defendant had nothing to do personally with the suing out of the execution, the levy, or the sale, and gave no directions in reference thereto except to his attorney. What these were, if any beyond the general one above stated, or what his attorney did in the premises, does not appear, but the defendant on the trial offered to prove that he did not directly or indirectly authorize or approve of any levy upon or sale of more of said goods than was necessary to satisfy his judgment and costs, which offer the court refused.

In this refusal, as well as in overruling the motion for a new trial, we think the court erred.

The defendant was responsible for the acts of the constable, if at all, only for the reason that he aided, directed or authorized them, or approved of them afterwards as done in his name or interest; and if they were several only for such as he so aided, directed, authorized or approved. In executing the writ, or in proceeding under color of it, the constable was acting as a public officer or in his own sole wrong, and not as the agent of the defendant, except so far as the latter, by some of the means mentioned, made him such. *Grund v. Van Vleck*, 69 Ill. 478; *Becker v. Dupree*, 75 Id. 167.

The levy upon goods of strangers to make the amount of the execution, although it might have been under an honest mistake as to the ownership, was in itself a trespass, and the defendant became liable therefor by receiving that amount so made, which was an approval of that act.

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But since the goods were in parcels the excessiveness of the levy was a further and independent wrong, not necessarily or naturally growing out of the other. It would have been no less wrongful if the goods had been the property of Keitz. There is nothing in the record tending to show that the defendant ever authorized or approved of that. The mere receipt of the amount of his judgment, with notice of the plaintiffs' claim, but not of the excessiveness or extent of the levy was not a ratification or approval of such excessiveness. *Coe v. Higdon*, 1 Disney (Ohio) 394. And in the absence of proof there is no presumption of law that the defendant or his attorney directed, authorized or approved of an act of the constable which would have been unprofitable as well as unlawful upon their own assumption of the facts.

We find nothing in the record to warrant an instruction on the subject of exemplary damages, or to support a verdict for more than the value of so much of the property as was reasonably necessary to make the amount of the defendant's judgment against Keitz, including his costs, which appears to have been not over one-sixth of what was taken by the constable.

For the error above indicated, the judgment of the county court is reversed and the cause remanded.

Reversed and remanded.

JOHN I. BROWN

v.

MICHAEL J. DAVIS.

ADVANCING CAUSE—FIVE-DAY RULE.—The rule of the Superior Court of Cook county, known as the "five-day rule," providing for the advancement of certain causes and their trial out of their regular order on the docket, is in violation of the Constitution and statutes regulating practice.

ERROR to the Superior Court of Cook county; the Hon. JOSEPH E. GARY, Judge, presiding.

Brown v. Davis.

Mr. S. K. Dow, for plaintiff in error; cited Nelson v. Akeson, 1 Bradwell, 165.

PER CURIAM. Defendant in error brought suit in the Superior Court of Cook county, returnable at the November term of that court, 1877, to recover upon a promissory note. At the December term the cause was advanced by the court and tried out of its order on the docket over the objection of the plaintiff in error, by virtue of the following rule of practice then in use in that court: "Ordered, That in any case *ex contractu*, pending on an issue or issues of fact only, or only requiring the *similiter* to be added, if the plaintiff, or an attorney or agent of the plaintiff, shall make an affidavit that he or she believes that the defense is made only for delay, the plaintiff, by giving the defendant's attorney, or the defendant, if he or she do not appear by attorney, five days previous notice, with a copy of such affidavit, that the plaintiff will bring on said case for trial at the opening of court on a day to be specified in such notice, or as soon thereafter as the court will try the same, may proceed to a trial at the time specified in said notice, unless it shall be made to appear to the court by affidavit of facts in detail, that the defense is made in good faith, when the case will remain to be tried in its regular order on the trial calendar."

This action of the court was excepted to at the time.

It has been repeatedly held by this Court that the rule above referred to was in violation of the Constitution and statutes passed in pursuance thereof, and was therefore void, and of no effect. Nelson v. Akeson, 1 Bradwell, 165; Sea v. Glover, Id. 365.

It was error to advance and try the cause out of its order on the docket, for which the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

Jenkins v. Jenkins.

JOHN JENKINS
v.
ELIZABETH JENKINS.

HUSBAND AND WIFE—SEPARATE MAINTENANCE.—To maintain an action for separate maintenance two facts must concur; the complainant must be living separate and apart from her husband, and she must be so living without fault on her part. So, where the evidence fails to show that it is without the fault of the complainant that she is living separate and apart from her husband, the action cannot be maintained.

APPEAL from the Circuit Court of Cook county; the Hon. W. W. FARWELL, Judge, presiding.

Mr. ARTHUR D. RICH, for appellant; that the decree can only be for separate support while the parties remain separate, cited 2 Bishop on Marriage and Divorce, § 361; Whorewood v. Whorewood, 1 Ch. Cas. 153.

Desertion for the purpose of bringing suit will not be excused in law: Doyle v. Doyle, 26 Mo. 545; Simons v. Simons, 13 Tex. 468.

If the wife voluntarily abandons her husband, or is compelled to on account of her own wicked conduct, she will not be entitled to separate maintenance: 1 Bishop on Marriage and Divorce, § 573; Wahle v. Wahle, 71 Ill. 510; Ross v. Ross, 69 Ill. 569; Angelo v. Angelo, 81 Ill. 251; Bevier v. Galloway, 71 Ill. 517.

Persons furnishing necessities to a married woman living separate from her husband, are bound to make inquiry as to the causes and circumstances of the separation, or they give credit at their peril: McCutcheon v. McGahay, 11 Johns. 282; Rutherford v. Coxe, 11 Mo. 347.

Complainant already has a proceeding for divorce pending against the defendant, in which she prays for alimony, and relief in this suit should not be granted: Stevens v. Stevens, 1 Met. 279; Dunnock v. Dunnock, 3 Md. Ch. 140; 2 Bishop on Marriage and Divorce, § 320.

The defense of another suit pending may be made by answer

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as well as by plea or demurrer: 1 Daniels' Ch. Pr. 715; Mitford's Eq. Pl. 362; Story's Eq. Pl. § 851; Cooper's Eq. Pl. *272; Beames' Pleas in Eq. 138; Curtis' Eq. Prac. 164; Simpson v. Brewster, 9 Paige, 246; Tarleton v. Vietes, 1 Gilm. 470.

Messrs. E. & A. VAN BUREN, for appellee; that pendency of former suit should have been set up by plea, cited Story's Eq. Pl. § 783.

The offer to receive the wife back is no defense to this action, and if it were it should be so broad as to restore her to all the rights and privileges of a wife: Ahrenfelt v. Ahrenfelt, Hoff. Ch. 47; Thompson v. Thompson, 2 Dallas, 128; May v. May, 62 Pa. St. 206; McClurg's Appeal, 66 Pa. St. 366; Kinney v. Kinney, 1 Yates, 78.

MURPHY, P. J. On the 7th day of June, 1878, the appellee exhibited her bill in chancery in the Circuit Court of Cook county against her husband, the appellant, praying for a decree directing the defendant therein to pay her a sum sufficient for her reasonable support and maintenance, and a further sum sufficient to enable her to prosecute her said suit.

This bill was filed in pursuance of Section 22, Ch. 69, of the Revised Statutes of 1877, which provides as follows: "That married women who without their fault now live or may hereafter live separate and apart from their husbands, may have their remedy in equity in their own names respectively against their said husbands for a reasonable support and maintenance while they so live separate and apart; and in determining the amount to be allowed, the court shall have reference to the condition of the parties in life and the circumstances of the respective cases; and the court may grant allowance to enable the wife to prosecute her suit as in cases of divorce." It will be seen that to maintain the action under the foregoing statute two facts must concur: first, the complainant must be living separate and apart from her husband; and secondly, she must be so living without fault on her part. In this case it is conceded that the appellee is living separate and apart from her husband, and the only question litigated in the court below and

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discussed in this court is whether she was so living without fault on her part.

The record discloses that the parties were married on the 14th day of April, 1867, in Canada West, and that immediately thereafter they removed to Chicago, where the appellant has since resided, and where the appellee has also resided, except a portion of the time she has been back in Canada; that the relations of the parties were unhappy, they never having been able to so live together as to constitute a great ornament to the society in which they moved, or reflect much honor upon themselves.

In 1869, appellee filed her bill in chancery against her husband, praying for a divorce, which, after some time, she dismissed on her own motion and returned home; remained there until 1872, when she filed a second bill for a divorce, which, upon full hearing in the Superior Court, was dismissed for want of equity.

The grounds alleged in both these bills were extreme and repeated cruelty. In 1874, she filed her third bill, alleging as a ground for divorce, in addition to the charge of cruelty, the further charge of adultery. Upon the trial of this cause, a jury was impaneled to try the issues, and returned a verdict against the appellee, upon which a decree of divorce was entered; also a decree for alimony and solicitor's fees. From this decree appellant appealed to the Supreme Court, where, by an opinion of that Court, filed on the 21st day of January, 1878, the decree of the court below, in all its parts, including the decree for alimony and solicitor's fees, was reversed, and the cause remanded, the Court remarking in the concluding sentence of its opinion:

"Defendant ought not to be required to pay further counsel fees or alimony."

After all this, and whilst the case so reversed by the Supreme Court remains pending, the appellee on the 5th day of May, 1878, accompanied by one Mrs. Smith, whose part in all the unhappy history between the parties to this suit appear to have been anything but that of a ministering angel of peace, returned to the residence of her husband, and claimed to have returned to resume the duties and privileges of a wife. As to just what

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transpired then and there, the testimony is in conflict, and the view taken by the court of the case renders it unnecessary at this time to reconcile or harmonize it. But of one fact there seems no doubt, and that is, that appellant ordered Mrs. Smith to leave his premises, which in the light of the history of her previous conduct in the premises was every way justifiable. Appellee claiming she was also ordered to leave by appellant, thereupon the appellee filed this bill for separate maintenance, under the statute as above given. The right of action, as we have seen, depends upon the question of fault on her part. If she is without fault in thus living apart from her husband, then this action is maintainable; otherwise, not. On the trial in the court below, appellant offered to prove the filing of these various bills by appellee against appellant, and that she had not returned in good faith to resume the sacred duties of wife, on the 5th day of May, 1878, but that, accompanied by her overzealous and meddlesome friend, Mrs. Smith, she went there for the discreditable purpose of obtaining facts for the foundation of further litigation with her husband, which proof was objected to by the appellee, and the objection sustained by the court, and exceptions taken by the appellant. This we think was error in the court below, and for which the decree of the court below is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

HENRY WILLETTTS

v.

CHRISTOPHER COTHERSON.

1. NEW PROMISE AFTER DISCHARGE IN BANKRUPTCY—SUFFICIENCY.—A different rule prevails as to the revival of a debt discharged by bankruptcy, and one barred by the Statute of Limitations. In the former case, the promise to pay must be shown to be clear, distinct, unequivocal and express. Neither payment of interest, nor part payment of principal, nor declaration of intention to pay, will suffice.

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2. PART PAYMENT AS EVIDENCE.—The fact of part payment would be admissible for the purpose of identifying the debt in reference to which an express promise to pay, otherwise of uncertain application, might be proved, but not as tending of itself to prove a sufficient promise to pay the balance.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Mr. JAMES S. MURRAY, for appellant; that the promise must be express, direct and unequivocal, cited *Allen v. Ferguson*, 18 Wall. 3; *Fraley v. Kelly*, 67 N. C. 78; *Stern v. Nursbaum*, 47 How. Pr. 489; *Yoxthemer v. Keyser*, 11 Pa. St. 364; *Merrian v. Bayley*, 1 Cush. 77; *Porter's Adm'r v. Porter*, 31 Me. 169; *Stewart v. Reckars*, 24 N. J. L. 427.

Mr. WALLACE L. DEWOLF, for appellee; that a new promise after discharge in bankruptcy will revive the debt, cited *Classen v. Schoenemann*, 80 Ill. 304; *Allen v. Ferguson*, 18 Wall. 1; *Hilliard on Bankruptcy*, 264.

PLEASANTS, J. This was an action originally brought before a justice of the peace to recover a balance remaining due upon a promissory note. Appellant, who was defendant below, by his assignment of errors questions the action of the Circuit Court in admitting the fact of part payment after his discharge in bankruptcy as evidence to prove a new promise sufficient to avoid the bar of such discharge, and in giving and refusing instructions.

His petition in bankruptcy was filed June 26, 1875, after the note had become due, and his discharge recites a composition with his creditors on the basis of fifteen per centum, and discharges him from the payment of the debts therein mentioned, among which was the one in question.

On the 4th of January, 1876, he paid appellee \$25 of the amount due under the composition, leaving a balance of about \$15, and on the 11th of May following let him have a horse, estimated at \$100, to apply on the note, but said nothing at that time about paying any more.

Appellee testified that appellant repeatedly after he went

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into bankruptcy said he would pay him "all that was coming to him"—"every cent that he owed him," but never when the note was present, and that appellant owed him other money besides that mentioned in the note. He was not definite as to the time, place, or particular conversation, nor did he state any in what purported to be the language of appellee, or more distinctly referring to the note. Another witness stated that at the request of appellee he went to appellant and asked for the money for him, but did not present the note, and that appellant said: "I have no money here, but come down next week and I will settle with you."

On the other hand, appellant testified that he never at any time after his discharge promised to pay the balance remaining on the note, but always said it was impossible.

The sufficiency of this evidence to support a finding of a reviving promise which would avoid the bar of the statute of limitations might be conceded, and yet well doubted as to the bar of a discharge in bankruptcy. We think it would be insufficient unless the finding was under proper instruction as to the law, which distinguishes the two cases in respect to the kind and measure of proof required. In the former it has been held that the promise may be implied from a part payment, or any declaration or other act recognizing its present existence; while in the latter it cannot, but must be shown to have been clear, distinct, unequivocal and express. Neither payment of interest, nor part payment of principal, nor declaration of intention to pay, will suffice. *Allen v. Ferguson*, 18 Wall. 3, and the cases there cited.

The Circuit Court refused all of the instructions asked by the defendant which declared this distinction, and gave one for the plaintiff that the jury might properly take into consideration, the fact of part payment after his discharge in bankruptcy, if proved, together with the other evidence in the case, in deciding whether the defendant promised to pay the balance of said debt at any time after such discharge.

We are inclined to think that this was error, that the fact of part payment would be admissible for the purpose of identifying the debt in reference to which an express promise to

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pay, otherwise of uncertain application, might be proved, but not as tending of itself to prove a sufficient promise to pay the balance; and that defendant was entitled to have the jury pass upon the evidence, with the distinct understanding that the law required an express and unequivocal promise. If the promise "to settle," which is not equivalent to a promise to pay, and the circumstance of part payment, had been excluded from the scales, it is uncertain on which side the evidence would have preponderated in the minds of the jurors. The judgment having been entered for plaintiff upon a verdict for \$171.75, which the court refused to set aside, it is for the reasons above stated reversed, and the cause remanded.

Reversed and remanded.

E. W. STANWOOD

v.

HARMON R. SMITH, Adm'r.

1. PAYMENT—APPLICATION.—In the absence of any agreement between the parties to make the application of an open, unstated account between them in payment of notes held by one against the other, no such application could be made.

2. PROMISSORY NOTE—ACCOUNT—STATUTE OF LIMITATIONS.—And where suit was brought upon the notes within sixteen years, the limitation of the notes, and it appeared that more than five years had elapsed after the cause of action upon the account had accrued, the Statute of Limitations operated against the account, and in the absence of any agreement to that effect, the account will not be considered as paid by an application upon the notes.

APPEAL from the Circuit Court of Cook county; the Hon. HENRY BOOTH, Judge, presiding.

Mr. WALTER G. GOODRICH, for appellant; that to take a case out of the bar of the Statute of Limitations, there must be an unequivocal promise, cited *Kimnel v. Schwartz*, Breese, 278; *Ayers v. Richards*, 12 Ill. 147; *Parsons v. Nor. C. & I. Co.* 38 Ill. 430; *Wachter v. Albee*, 80 Ill. 47; *McGrew et al. v. Forsyth*, 80 Ill. 596; *Mullett v. Shrumph et al.* 27 Ill. 110.

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Claims against an estate must be presented within two years: *Dickerson v. Sutton*, 40 Ill. 403; *Wells v. Miller*, 45 Ill. 82; *Shepard v. Rhodes*, 60 Ill. 301.

In a case like this, the Statute of Limitations need not be specially pleaded: *Thompson v. Reid*, 48 Ill. 118.

A demand barred by the statute cannot be set off: *Angell on Limitations*, Chap. 2, § 23.

Messrs. WILSON & PERRY, for appellee; that this court will not review the finding of the court below, because neither exceptions to the finding nor any motion for a new trial are embodied in the bill of exceptions, cited *Bills v. Stanton*, 69 Ill. 51; *Force Mfg. Co. v. Horton*, 74 Ill. 310; *Nimmo v. Kuykendall*, 85 Ill. 477.

MURPHY, P. J. On the 21st day of March, 1863, Hiram Longley, in his lifetime, made his promissory note for \$500, and on the 27th day of January, 1864, he made his other promissory note for \$500, each due one day after date, payable to the order of Andrew J. Hayward, with interest at the rate of ten per cent. per annum. Some time in the year 1872 said Hayward departed this life, these notes at the time being in his possession. Pliny Hayward was appointed executor of his last will and testament, and immediately entered upon the discharge of his duties as such. In the course of his duties as executor, he sold and transferred the notes above mentioned to the appellant, by indorsement thereon, in consideration of the payment of \$500 to one of the legatees under the will of said A. J. Hayward, deceased, and some other trifling consideration. On the 15th day of February, 1877, Hiram Longley departed this life, these notes, still out-standing. On the 8th day of November, 1877, the appellant presented the notes against said Longley's estate, in the Probate Court of Cook County, for allowance.

The appellee set up, by way of defense thereto, an alleged account for the board of said A. J. Hayward and his family, in his lifetime, which account was open and unstated between the parties, and was in the nature of a cross-action against the estate of said Hayward.

On the hearing the court found the issues for the defendant in that court, from which appellant took an appeal to the Circuit Court. At the trial in the Circuit Court a jury was waived, and the cause submitted to the court for trial. The court found the issues joined for the defendants, from which judgment appellant brings the record here, and asks a reversal on the ground that the finding of the court should have been the other way, for the amount of the notes.

It thus appears that after the decease of A. J. Hayward, the payee of the notes, they were sold for a valuable consideration, indorsed over by his executors to the appellant, who brings suit to recover on them. The defense relied upon by the appellee in the court below, was payment. It appears that in the lifetime of Andrew J. Hayward and Hiram Longley, deceased, they had dealings to a very considerable amount; that Hayward and his family boarded with Longley, who was a hotel-keeper, for a long time, the account for which, after Hayward's decease, amounted to \$4,283.87. This account bears date, and the liability accrued thereon, June 1st, 1863. Under the Statute of Limitations then in force, the right of action thereon would be barred in five years from that time, and the right of action on the notes would not be barred under sixteen years, within which time this action was instituted. This account is relied upon as a payment of these notes, and it is urged by the appellee that the Statute of Limitations did not run against the account, for the reason that it was applied in payment of the notes, and was itself thus paid.

We have examined the record carefully, and find no proof of any agreement between the parties to make the application of the account in payment of these notes, and in the absence of such agreement no such application could be made.

This account, it will be remembered, is an open, unstated account, and in the absence of any agreement to that effect,

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could not be treated as payment of the notes, or as anything but a cross-action in favor of the appellee, and subject to the operation of the Statute of Limitations, the same as any action on open account. It appears that some time in 1868, Longley called upon A. J. Hayward, and had some talk about the state of the accounts, but nothing is shown to have been said or done by Hayward which we think was sufficient in law to take a case out of the operation of the Statute of Limitations, and that therefore the account was barred; and as a consequence, as we have seen, was no defense to the notes. We think the finding and judgment of the court below should have been for the appellant for the amount of the notes; that it was error to find for the appellee; for which error the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

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PRINCIPAL AND AGENT.

2. *Malicious prosecution.*—A principal is not liable for malicious prosecution by reason of the acts of his agent in instituting a prosecution, unless with knowledge of all the circumstances he adopts and continues such prosecution. *Dally et al. v. Young*, 39

3. *Ratification.*—If a principal intends to repudiate the acts of his agent, it is his duty to do so at once on receiving knowledge of them. If he neglects to do so, and by his silence and delay, the party contracting with the agent is led to believe that he has consented thereto, and thereby parts with a valuable consideration, the principal will be held to an implied ratification of the agreement. *Johnston v. Berry*, 256

SET-OFF.

4. *Against agent.*—Where one deals with an agent, knowing the agency, he cannot set off a claim due him from the agent against a debt due the principal. *Beutcher v. Hucks*, 144

AGREEMENT.

PAROL.

1. *To pay a non-existing bill.*—R. & Son became indebted to N. & Co., and to enable them to go on with their business and pay up this indebtedness, N. & Co. agreed to advance further sums for the purchase of grain and reimburse themselves from the proceeds of the grain sold. In furtherance of this agreement the agent of N. & Co. called upon appellees, who were bankers, informed them of the agreement with R. & Son, and arranged with appellees for the opening of a bank account between R. & Son and appellees, telling them that N. & Co. would honor all bills drawn on them by R. & Son in the regular course of business with N. & Co. Drafts to a large amount were afterwards drawn by R. & Son, cashed by appellees and honored by N. & Co. Held, that the parol promise to pay such drafts when made, was valid, and that N. & Co. were liable for payment of the drafts in suit. *Nelson et al v. Ravens et al.*, 565

AMENDMENTS.

PLEA IN ABATEMENT.

1. *Cannot be amended.*—A plea in abatement is a dilatory plea, and is not amendable. *Dunaway v. Goodall et al.*, 197

AMENDMENTS.

WHEN ALLOWED.

2. *Appeal bond*.—Where plaintiff had filed an amended bond, and on motion to dismiss the appeal by reason of a defect in the amended bond, *held*, that plaintiff should have been permitted to further amend his bond. *Stilley v. King*, 338

ANIMALS.

Dogs.

1. *Running at large*.—The killing of a dog running at large in violation of an ordinance prohibiting the same, is not such an unauthorized proceeding as will create a liability for its loss. *Leach v. Elwood et al.*, 453
2. *Liability of owner of dog accustomed to bite*.—It is not necessary to show that the keeper of a dog has allowed him to bite a large number of his neighbors or their animals, before he commences to be liable; but it is enough to show that there is within his knowledge a probability that he may do so. If he have reasonable grounds to suppose that the dog may do so, he must restrain him, or be liable for the consequences. *Flansburg v. Basin*, 531

APPEAL.

BOND.

1. *Amendments*.—In response to a rule to file an amended appeal bond, plaintiff filed a bond which misrecited the date of the judgment, and on motion to dismiss the appeal for this defect, plaintiff asked leave to amend by inserting the correct date. *Held*, that the amendment should have been allowed. *Stilley v. King*, 338

BY VILLAGE.

2. *Bond must be given*.—A city or village incorporated under the general law, must give a bond on appeal the same as other parties to a suit. *Village of Warren v. Wright*, 420

DECREE IN VACATION.

3. *Is not final*.—A decree filed in vacation, in the absence of any stipulation of the parties that such decree shall be final, is not such a final decree as may be appealed from. *First Nat. Bank of Olney v. Cope Bros. et al.*, 203

GENERALLY.

4. *From county court*.—A suit under the statute, to recover the amount of tax due upon forfeited real estate, is a common law action within the meaning of the statute requiring appeals from the county court in common law actions to be taken to the Appellate Court. *West et al. v. The People*, 377

TO APPELLATE COURT.

5. *Must be from final order*.—This court has jurisdiction only in matters of appeal and writs of error from the *final* judgments, orders and decrees of the circuit and other courts. *The People v. Neal et al.*, 181

WHEN MAY BE TAKEN.

6. *Joint defendant*.—One of two joint defendants, against whom a final judgment has been rendered, although no judgment has been taken

APPEAL.

WHEN MAY BE TAKEN. *Continued.*

against the other, has the right to appeal therefrom. *Waugh v. Suter et al.*, 271

7. *In trial of right of property.*—In the trial of right of property, an appeal should be prayed for on the day of entering judgment in the cause. *Murphy v. McDonald*, 19

APPLICATION OF PAYMENTS.—See PAYMENTS.

ARBITRATION AND AWARD.

ARBITRATORS.

1. *Oath—Waiver.*—An award, sufficient in other respects, will be good at common law or as a statutory award although the arbitrators were not sworn. The parties may waive the statutory requirement, and proceeding to a hearing without objection, will be deemed to have so waived the swearing. *K. & S. W. R. R. Co. v. Alfred*, 511

AWARD.

2. *Enforcement.*—The submission being of all matters in dispute with regard to the right of way, the award was not one on which a judgment could properly have been rendered for a sum of money. The payment of the money, and conveyance of the right of way were properly made concurrent acts, but the enforcement as a statutory award, could only have been completed under section eight of the statute. *K. & S. W. R. R. Co. v. Alfred*, 511

3. *Extent.*—Although in obtaining a right of way by a proceeding under the statute, the compensation should all be in money, yet under a submission of all disputes on the subject, an award as to construction of fences and crossings was within the power conferred. *K. & S. W. R. R. Co. v. Alfred*, 511

4. *Impeaching award.*—An arbitrator should not be allowed to impeach his award by merely saying that he and his co-arbitrators neglected to be sworn. *K. & S. W. R. R. Co. v. Alfred*, 511

5. *Recitals.*—It is not necessary that it should appear on the face of the award that the arbitrators were sworn. *K. & S. W. R. R. Co. v. Alfred*, 511

ARBITRATORS.—See ARBITRATION AND AWARD.

ASSIGNMENT.

EQUITABLE ASSIGNMENT.

1. *Acceptance by drawee.*—Where the order is drawn either on a general or particular fund for a part only, it does not amount to an assignment of that part, or give a lien against the drawee, unless he consents to the appropriation by an acceptance of the draft. *Moore v. Gracelot*, 442

2. *Assignee to give notice.*—It is the duty of the assignee, if he would protect himself, to give prompt notice of the assignment to him, and a failure to do so, although it would not destroy his right, would expose it to the danger of being overreached by a subsequent assignment to

ASSIGNMENT.

EQUITABLE ASSIGNMENT. *Continued.*

another, or to the rights of an attaching creditor of the assignor. *Moore v. Gravelot*, 442

3. *Order on particular fund.*—An order or draft drawn for the whole of a particular fund operates as an equitable assignment of that fund, and after notice to the drawee it binds the fund in his hands. *Moore v. Gravelot*, 442

ATTACHMENT.

AFFIDAVIT.

1. *When to be made.*—The ground for an attachment should exist at time the proceeding is commenced, and for this reason the time intervening between the making of the affidavit and the commencement of attachment proceedings should not be unreasonable. The two acts need not be simultaneous, but done within a reasonable time, regard being had to the situation of the parties in each particular case. In this case, eleven days between the making and filing the affidavit was held to be an unreasonable time. *Foster et al. v. Illinski*, 345

WRIT.

2. *Return.*—The return of the attachment writ should show that the property was levied upon as belonging to the defendant. *Foster et al. v. Illinski*, 345

ATTORNEY,

DUTIES.

1. *Abandonment of case.*—When an attorney accepts employment in a case, in the absence of a special contract to the contrary, the law implies an obligation on his part to attend to it until it is determined, and he cannot abandon it without just cause. He may demand payment of fees already earned, and if not paid, may upon reasonable notice withdraw from the case, but a refusal to pay some other demand will not justify him in leaving the case. *C. & St. L. R. R. Co. v. Koerner*, 248

LIABILITY.

2. *For trespass.*—An attorney who instructs a constable as to the manner of making a levy, and afterwards receives the proceeds of the sale, with full knowledge of the acts of the constable, thereby ratifies and adopts such acts, so as to make him a trespasser *ab initio*. *Ferriman v. Fields et al.*, 252

AVERMENTS.—See PLEADING.

AWARD.—See ARBITRATION AND AWARD.

BANKRUPTCY.—See NEW PROMISE.

BILL OF EXCEPTIONS.

REQUISITES OF.

1. *What must be inserted in.*—A bill of exceptions must contain the affidavits read on motion for new trial, and the instructions given and refused, and must purport to contain all the evidence. *Bulmer v. Worthing et al.*, 460; *Rockenfeller et al. v. Tobias et al.*, 461; *Gregory v. Spencer*, 80

BONDS.—See APPEAL—MUNICIPAL BONDS.

OFFICIAL.

1. *Liability of sureties.*—The undertaking of a surety upon the official bond of a township treasurer, is that the principal shall pay over to his successor all moneys in his hands as such treasurer during his term of office, and the surety is not liable for his wrongful acts prior to the execution of the bond, *McIntyre et al. v. Trustees, etc.*, 77

REPLEVIN.

2. *Satisfied on a proper return of property.*—A return of the property replevied to a constable who holds an execution on a judgment in favor of the attachment plaintiff, though not the same officer who seized the property, and to whom the replevin bond was executed, is sufficient, and constitutes no breach of the bond. *Richards et al. v. Rape*, 24
3. *Surrender by constable to the defendant.*—Nor does a subsequent surrender of the property by such constable to the defendant, under a claim of exemption, affect the rights of the surety on the bond. His obligation was satisfied on a proper return of the property. *Richards et al. v. Rape*, 24

BRIDGES.—See ROADS AND BRIDGES.

CHANCERY.

AVERMENTS.

1. *Rights of third parties.*—A party bringing his bill to correct a mistake in the record of a court, is not obliged to aver that no rights of third parties have intervened. The law will not presume that such rights have accrued, and it is not necessary such fact should be negatived in the bill. *Edwards v. Sams et al.*, 168

CONTINUANCE.

2. *Affidavit—What is required.*—An affidavit for continuance of a motion to dissolve an injunction should satisfy the court that the whole or some material portion of the answer is untrue; that the complainant has testimony to prove its falsity; and that since the coming in of the answer he has had no opportunity to procure such testimony. *Wilson v. Weber*, 125

DECREE.

3. *Parties to.*—It is erroneous to enter a decree affecting the interests of parties who are not served with process, and are not before the court. *Pratt v. Pratt et al.*, 582

DEMURRER.

4. *General.*—If the complainant is entitled to any relief on the case made by his bill, a general demurrer thereto should be overruled. *Crane et al. v. Hutchinson et al.*, 30

GENERALLY.

5. *Relief in equity.*—The lien of appellants' judgment was subject to a certain mortgage, but prior to a contract of sale with one M. for a portion of the land, and could have been enforced without regard to such contract; but appellants in their bill, electing to abide by the contract with M., it was not error to decree an application of the money paid by M. to the payment of the mortgage, and that M. should have the land freed from appellants' lien. *Reid et al. v. Gunnison*, 452

CHANCERY. *Continued.*

JURISDICTION.

6. *Liability of officers of corporation.*—The liability against officers and directors of a corporation, under the general incorporation law, is to the creditors as a whole, and not to any individual creditor, and this liability can be enforced only in chancery. *Buchanan v. Bartow Iron Co.* 191; *Buchanan v. Low*, 202

7. *Once obtained, complete relief will be afforded.*—When equity obtains jurisdiction, it will retain it, and do complete justice between the parties under the contract, adjusting all questions arising under it. *Apperson v. Gogin et al.*, 48

8. *To correct mistakes.*—A court of equity has unquestioned power to correct mistakes in the record of a court. Where the parties to the record seek a correction, it may be made upon motion and proper notice to the other party, in the court where the mistake occurred, but this rule does not apply to one who was not a party to the record, and was not chargeable with notice of the mistake. *Edwards v. Sams et al.*, 168

9. *Diligence in seeking correction.*—Where a party within ten days after discovery of the mistake brought his bill for correction, he will not be charged with want of diligence. *Edwards v. Sams et al.*, 168

PRACTICE.

10. *Assessment of damages on dissolution of injunction.*—A failure to show in the record the testimony upon which the allowance was made, is fatal to a decree assessing damages. *Wilson v. Weber*, 125

11. *Default.*—While the answer of a defendant is on file, it is error to enter a default against him. *Apperson v. Gogin et al.*, 48

12. *Dismissal of bill.*—Where the allegations of a bill are such that, if established, relief would be granted, the bill should be retained until a final hearing is had, and it is error to dismiss the same on a motion to dissolve an injunction. *Wilson v. Weber*, 125

13. *Rendering decree in vacation.*—A decree rendered in vacation, in the absence of any stipulation of the parties that such decree shall be final, is not such a final decree as may be appealed from. *First Nat. Bank of Olney v. Cope Bros. et al.*, 203

14. *Stating facts in record—Exception to rule.*—The facts on which a decree is based must appear somewhere in the record, either by being contained in the master's report, in depositions on file, taken as required by law, in exhibits or by certificate of evidence. If not in this manner, they must appear on the face of the decree. Proceedings for a mechanic's lien are an exception to the rule above stated. So, also, where the decree is based upon the verdict of a jury in an issue out of chancery; but, in the latter case, if the court enters a decree contrary to the verdict, such decree must be sustained by evidence preserved in the record. *Bonnell v. Lewis*, 283

POWERS OF COURT.

15. *To correct mistake in deed.*—A court of equity has power to correct a mistake in a deed, and, upon competent proof, will order the mistake corrected. *Bohanan et al. v. Bohanan*, 502

CHANCERY. *Continued.*

SPECIFIC PERFORMANCE.

16. *When decreed.*—The Bill of Complaint alleged the obtaining of certain judgments against complainant, and a subsequent agreement that upon the delivery of certain personal property mentioned, the judgments should be satisfied. It further alleged the delivery of the property according to the agreement, and a failure to give credit therefor on the judgments. *Held*, that nothing short of a specific performance would be an adequate remedy, and that equity alone could give that remedy. *Apperson v. Gogin et al.*, 48

TENDER.

17. *Of deed.*—B. gave to H. a bond for a deed, and afterwards executed a deed in *escrow*, to be delivered on payment of the notes mentioned. H. fraudulently obtained the deed, placed the same on record, and afterwards conveyed the premises to third parties. On a bill filed by B. to set aside the deed, and for a lien upon the premises, *held*, that it was not necessary to tender a deed to H. according to the conditions of the bond, before bringing suit. *Crane et al. v. Hutchinson et al.*, 30

CITIES AND VILLAGES.

APPEALS BY.

1. *Must give bond.*—Cities and villages incorporated under the general law must give bond on appeal, the same as other parties to a suit. *Village of Warren v. Wright*, 420

DUTIES.

2. *Repairing sidewalks.*—Trustees of villages are bound to exercise ordinary care and diligence to keep the sidewalks in the village safe; and if in the exercise of this duty they bestow ordinary care and diligence, no liability arises, though the sidewalk may not be reasonably safe. *Village of Warren v. Wright*, 602

3. *Notice of defect.*—Where the sidewalk is constructed by the property owner, and not by the city, notice to the city of its condition is requisite to charge it with liability. *Village of Warren v. Wright*, 602

INCORPORATION.

4. *Judicially noticed.*—Courts will take judicial notice of the charter or incorporating act of a municipal corporation, without it being specially pleaded, not only when it is declared to be a public act, but when it is public or general in its nature. *The People v. Wilson*, 363

LIABILITY.

5. *For acts of servant.*—If a person is employed by a city in the character or relation of servant, to remove an obstruction from the streets, and by reason of the negligent, careless manner in which the work is done an injury results, the city would be liable for the damages occasioned thereby; but, where the evidence showed that the obstruction was removed by a person under a contract for a stipulated sum, he is not a servant but a contractor, and the question of the relation of master and servant should not have been submitted to the jury. *City of East St. Louis v. Giblin*, 219

6. *What must be shown.*—A person claiming damages of a city in consequence of injuries received by reason of the negligence of a servant

CITIES AND VILLAGES.

LIABILITY. *Continued.*

of the city in performing an official duty, in order to a recovery, must show that the person doing the act was the servant of the city in respect to the thing done, and that by unskillfulness or carelessness on his part the plaintiff received the injury complained of. *City of East St. Louis v. Klug*, 90

LICENSE.

7. *Compelling issue of.*—The passage by a village board of a resolution fixing the amount to be paid for a license to keep a dram-shop, cannot be regarded as an ordinance properly passed, wherein the village authorities undertake to exercise the powers regarding licenses vested in villages by the statute, and a party tendering the amount so fixed to be paid for a license, and a bond, is not, by virtue of such resolution, entitled to a peremptory writ of mandamus requiring the village to issue a license to him. *Village of Crotty v. The People*, 465

ORDINANCES.

8. *Rights under.*—Although ordinances should be uniform, operating alike upon all classes, yet it has never been held that an ordinance granting license should be so general in its provisions that any person complying with its terms is entitled to receive such license without any regard to his moral fitness to conduct the business. *Village of Crotty v. The People*, 465

MAYOR.

9. *Protection of citizens.*—It is not the duty of the mayor of a city, by virtue of his office, to see that the lives and property of the citizens are properly protected. The powers and duties of the mayor are wholly of an executive nature, and must be conferred or enjoined on him by legislative enactment or municipal ordinance. *City of East St. Louis v. Giblin*, 219

POWERS.

10. *To prevent dogs running at large.*—The legislature may confer upon a city authority to pass an ordinance declaring what shall be considered a nuisance, and may, when necessary for the public safety, authorize dangerous animals to be summarily killed by the authorities, without notice to the owners. *Leach v. Elwood*, 453

COMMISSIONERS OF HIGHWAYS.—See ROADS AND BRIDGES.

COMMON CARRIER.—See CONTRACTS.

CONSIDERATION.

1. *Gift.*—A note executed and delivered as a gift is without a valuable consideration and will not support an action. *Arnold et al. v. Franklin*, 141

FAILURE OF.

2. *In promissory note.*—A failure of consideration, in whole or in part, cannot be set up as a defense, where the note has been assigned before its maturity for a valuable consideration, without tracing its defects to the knowledge of the assignee. *Taylor v. Thompson*, 109

CONSIDERATION. *Continued.*

SUFFICIENT.

3. *Mutual promises*.—One promise is a sufficient consideration to support another promise. *Crane et al. v. Hutchinson et al.*, 30

CONSTITUTIONAL LAW.—See REVENUE.

TAXES.

1. *Suit for forfeiture*.—The statute providing that suit may be brought against the owner for the amount of tax due upon forfeited property, is not in conflict with the provisions of the Constitution. *Smith v. The People*, 380

CONTINUANCE.—See AFFIDAVIT.

CONTRACTS.

BY CITY OFFICER,

1. *When interested*.—If a municipal officer contracted to furnish an article to a corporation, and had an interest in its sale, he would come within the prohibition of the statute forbidding such contracts by an officer; but where he only ordered the article by authority of the city, and advanced the money to pay for it, he would not. *City of Anna v. O'Callahan*, 176

BY COMMON CARRIER.

2. *Conditions*.—Suit was brought against an express company for a failure to carry safely a package of money. Defendant pleaded a contract with conditions, setting them out. *Held*, that the proof would not sustain the averment if it appeared that the condition was not known or assented to by plaintiffs; that it was unnecessary to aver more than that it was the contract; if the condition was unknown or not accepted, it did not become a part of the contract. *Adams Ex. Co. v. King*, 316

BY COMMISSIONERS OF HIGHWAYS.

3. *Bridge between two towns*.—The contract for the building of such a bridge should be executed by a majority of the commissioners of each town acting as a separate body. *Com'rs of Highways v. Wrought Iron Bridge Co.*, 570

CONSTRUCTION.

4. *Written agreement*.—A written agreement in relation to the sale of certain property excepted a mortgage of \$600—the payment of which was assured by the party promising. *Held*, that the exception as to the mortgage was not of the amount, but merely descriptive of the mortgage, and that an accumulation of \$300 interest on the mortgage was included. *Harpstrie v. Vase*, 121

FOR LABOR.

5. *Discharge for incompetency*.—Where a servant or laborer is discharged for incompetency, he is entitled to recover only for wages due him up to the time of his dismissal. *Du Quoin Mining Co. v. Thorwell*, 394

OF GUARANTY.

6. *In promissory note*.—The law is well settled that the holder of a promissory note has no authority to write a contract of guaranty over

CONTRACTS.

OF GUARANTY. *Continued.*

the name of an indorser, unless such act is the mere reducing to writing of a previously existing contract of guaranty. *Windheim v. Ohlendorf*, 436

RESCISSION.

7. *Sale of machine.*—A party seeking to rescind a contract for the sale of a machine, on the ground that it did not work as warranted, must return or offer to return it within a reasonable time after he discovers its defects. He cannot use the machine through a whole season, lay it aside, and then defeat a recovery of the contract price on the ground that it did not work well. *Morgan & Co. v. Thetford*, 323

8. *Sale of lands.*—A contract for the sale of lands, deed to be given on payment being made as described therein, is not broken by the vendor bringing a suit of forcible detainer and getting possession of the lands, the agreement not providing for possession by the vendor. *Babcock et al. v. Hamende*, 426

SPECIFIC PERFORMANCE.

9. *Of parol contract.*—Before a court will decree specific performance of a parol contract, the proof to sustain it must be clear and unequivocal. *Cooper v. Cooper*, 492

CONVEYANCES.—See DEEDS.

IN FRAUD OF CREDITORS.

1. *Insufficiency of evidence.*—This cause is reversed because of the insufficiency of the evidence to establish the *bona fides* of a conveyance from father to son. *Fleming v. Hiob et al.*, 390

CORPORATIONS.

GENERALLY.

1. *Service upon.*—The statute provides that service of process upon a corporation should be made upon the president, secretary, etc., if to be found, if not, then upon any director, clerk, etc. Before service upon persons composing the second class will confer jurisdiction, it must appear affirmatively that service could not be had upon persons in the first class, and this should appear in the return of the officer. *St. L. V. & T. H. R. R. Co. v. Dawson*, 118

2. *Upon foreign insurance company.*—Service upon a foreign insurance company, which states that the president of the company was not found in the city of Aurora, but fails to state that he was not found in the county where suit was brought, is not sufficient. *Mich. Ins. Co. v. Abens*, 488

3. *When company has ceased doing business.*—Where a foreign insurance company has ceased doing business in this State, service may be had upon the last designated agent of such company acting in this State. *Mich. Ins. Co. v. Abens*, 488

OFFICERS.

4. *Personal liability.*—Under the general incorporation law creating a personal liability against the officers and directors of corporations, for indebtedness exceeding the capital stock, such directors and officers are

CORPORATIONS.

OFFICERS. *Continued.*

liable only to the creditors as a whole, and this liability can be enforced only in chancery. *Buchanan v. Bartow Iron Co.*, 191; *Buchanan v. Low*, 202

PRIVATE.

5. *Denial of incorporation*.—A subscriber to the capital stock of a company, when he participates in its organization and acts as a director, is estopped from showing that the company failed to comply with the law, in its organization. *Rutz v. Esler & Ropiequet Co.*, 83

6. *Procuring subscriptions to stock*.—Where a corporation sends out agents to procure subscriptions to its stock, and such subscriptions are obtained by fraudulent representations, the fraud may be set up in bar of a recovery on a suit for such subscriptions; but where subscriptions are procured by commissioners, prior to the organization of the company, their fraudulent representations constitute no defense to a suit for such subscriptions. They are not the agents of the company. *Rutz v. Esler & Ropiequet Co.*, 83

7. *Subscriptions—Release of, to certain subscribers*.—A release of all or a portion of the amount subscribed by some of the stockholders, releases all the stockholders who do not assent to such release, or in some way give their sanction to it. Such release destroys the equality that exists between subscribers according to their subscriptions, which is the very essence of the contract. *Rutz v. Esler & Ropiequet Co.*, 83

STOCKHOLDER.

8. *Liability*.—In order to render a stockholder liable, under the statute to the extent of his unpaid stock, for the debts of the corporation, proceedings must be instituted against him at the same time that action is begun against the corporation on the principal cause of action. *Peck v. Coalfield Coal Co.*, 619

9. *Special remedy must be enforced*.—A general liability created by statute, without a remedy, may be enforced by any appropriate common-law action; but when the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone, must be employed. *Peck v. Coalfield Coal Co.*, 619

TOWNS.

10. *Rights in highway*.—A town has no such possessory right in a highway as will enable it to maintain trespass *quare clausum fregit*. *St. L. V. & T. H. R. R. Co. v. Town of Summit*, 155

COSTS.

AGAINST SCHOOL OFFICERS.

1. *Not allowed*.—No costs can be charged where any agent of any school fund suing for the recovery of the same is plaintiff, and is unsuccessful in such suit. *Trustees of Schools v. Stokes et al.*, 267

COUNTIES

ACTIONS AGAINST.

1. *Declaration in common counts*.—In an action against a county there are many different causes of action which may be proved under a

COUNTIES.

ACTIONS AGAINST. *Continued.*

declaration containing only the common counts. *Gould v. County of Rock Island,* 423

COURTS.

APPELLATE COURT.

1. *Appeals to.*—A suit under the statute to recover the amount of tax due upon forfeited real estate, is a common law action within the meaning of the statute requiring appeals from the county court in common law actions to be taken to the Appellate Court. *West et al. v. The People,* 377

RULES OF.

2. *Rights of parties.*—The court, by virtue of power conferred to establish rules for the dispatch of business, cannot by such rules deprive a party of a substantial legal right, unless it has in some manner become forfeited under such rules. *Crotty v. Wyatt,* 388

COVENANT.—See ACTIONS.

CREDITOR'S BILL.

FRAUD.

1. *Insufficiency of evidence.*—The preponderance of testimony in this case, showing that plaintiff in error received the conveyance in good faith, in satisfaction of a *bona fide* debt, and with no knowledge of other indebtedness of the grantor, and no fraudulent intent, the conveyance should not have been set aside as being in fraud of creditors. *Young v. Stearns et al.,* 498

FRAUDULENT CONVEYANCE.

2. *Judgment.*—A judgment, to be valid as against the claims of creditors, must be founded upon a pre-existing indebtedness, and it appearing that at the time the judgment in question was rendered, there was no such indebtedness, the whole proceeding was a fraud upon the creditors of the judgment debtor, and as to them a nullity. *Sprague et al. v. Noble et al.,* 521

CURATIVE ACT.—See RAILROADS.

DAMAGES.

ASSESSMENT OF.

1. *On dissolution of injunction.*—Where the solicitors for the defendants were the attorney-general and the State's attorneys of the several counties whose collectors were restrained, and they are performing *ex-officio* service, it is error to decree an allowance for such services as damages on dissolution of the injunction. *Wilson v. Weber,* 125

EXEMPLARY.

2. *In slander of title.*—In actions of this nature there may be evidence of such a wanton, willful and malicious attempt to injure the owner of the land as will justify the finding of exemplary damages. *Van Tuyl v. Riner,* 556

DAMAGES. *Continued.*

IN RECOUNPMENT.

3. *Actual*.—Only actual damages can be allowed in recoupment. *Meyer et al. v. Stookey*, 336

IN TRESPASS.

4. *General and special*.—A railroad by its charter was bound to restore a highway which it crossed in such a manner as not to impair its usefulness, but it not appearing how it was in any way bound to restore the bridge in question, it was error to admit evidence of how much it would probably cost to repair the bridge. Damages which necessarily result from the act done may be shown under the *ad damnum*, but special damages must be specially alleged. *St. L. V. & T. H. R. R. Co. v. Town of Summit*, 155

MEASURE OF.

5. *Against a justice for failure to deliver papers*.—The liability of a justice of the peace for a failure to deliver up, when demanded, a note left with him for collection, would be nominal, and beyond that, measured by the actual value of the note. *Hays et al. v. The People*, 57

6. *Breach of replevin bond*.—In a suit upon a replevin bond for a failure to deliver the property replevied, where the property was never taken into possession because of it being held by a prior incumbrance, the measure of damages would be the loss sustained by the execution creditor by the failure to deliver the property; the value of the property subject to any defects or incumbrances that existed at the time it was replevied. *Jackson v. Bry*, 586

7. *For removing fixture*.—Where a party has only a life estate in the realty, he can recover only such damages as were sustained to the life estate, for the removal of a fixture. *Sagar v. Eckert*, 412

8. *Loss of profits*.—In actions of tort where the amount of profits of which the injured party is deprived as a legitimate result of the trespass, can be shown with reasonable certainty, such profits, to that extent, constitute a safe measure of damages, and so far as they are plainly traceable, he should receive compensation for them, but such damages must be the necessary and natural consequence of the act. Profits which are merely probable and speculative, cannot be recovered. *Ill. & St. L. R. R. & C. Co. v. Decker*, 135

9. *Prospective profits*.—Where it is sought to recover for loss of profits in trade or business, the evidence must afford the jury some data from which they can with reasonable certainty determine the loss of profits. No fixed, certain guide for estimating such damages can be established. *Ill. & St. L. R. R. C. Co. v. Decker*, 135

10. *Mitigation* *cf.*—In an action of slander, if the defendant, although he cannot fully justify, had reason to believe that the charge was true, such fact should be considered in mitigation of damages. *Moore v. Mauk*, 114

DAYS OF GRACE.—See PROMISSORY NOTES.

DEBTOR AND CREDITOR.

PREFERENCE.

- Debtor may prefer*.—A debtor has the undoubted right to secure one

DEBTOR AND CREDITOR.

PREFERENCE. *Continued.*

creditor so far as he is able, even if in so doing he defeats the collection of the claim of another creditor unless his real purpose was to hinder or defeat the other creditor in the collection of his claim; and the mere knowledge by the creditor thus secured, of the existence of other claims against the debtor, will not affect his rights, he having no other object in view than to secure himself. *Artel v. Cullen*, 527

DECLARATION.—See PLEADING.

DECREE.—See CHANCERY.

DEDICATION.—See ROADS AND BRIDGES.

DEED.—See CONVEYANCES.

COVENANTS OF WARRANTY.

1. *Suit on—What should be shown.*—Under the covenant of general warranty, the covenantee, in order to recover, must show, either that he is unable to obtain possession under the title derived from the grantor by reason of a paramount title, under which the land is held adversely, or that he has been evicted by a paramount title outstanding at the time of the execution of the deed. This rule is, however, subject to exception in a case where the covenantor by his prior, or subsequent acts, defeats the title that he has covenanted to defend. *Dugger et al. v. Oglesby*, 94

DELIVERY.

2. *To third person.*—While it is true that it is essential to the legal operation of a deed that the grantee assents to receive it, yet it is equally true that it can be delivered to a third party by sufficient authority from the grantee, and such delivery will be as effectual to pass the title as if made to the grantee himself. *Young v. Stearns et al.*, 498

GENERALLY.

3. *As evidence—In suits for forfeited tax.*—In an action to recover the amount of tax due on forfeited real estate, it is competent to give in evidence deeds tending to show that the defendant was the owner of the land at the time of the assessment. *Smith v. The People*, 380

4. *Conveying right of flowage.*—A deed of a right to flow land is not a mere license revocable by the grantor. *Patterson v. Sweet*, 550

5. *Effect of.*—A deed of a right to flow land is not a mere license revocable by the grantor. Nothing short of a re-conveyance or non-user for twenty years will destroy the effect of the deed so that the land will revert to the grantor. *Patterson v. Sweet*, 550

6. *Mistake—Power of court to correct.*—The evidence tending strongly to show the intention of the parties that the land should be conveyed to the son in fee, instead of to the father, the grantee named in the deed, a court of equity will correct the mistake, and order a conveyance of the fee to the heirs of the son. *Bohanan et al. v. Bohanan*, 502

HABENDUM.

7. *Is part of the deed.*—The *habendum* clause is a part of the deed, and recitals made therein become a part of the deed. *Blaisdell v. Smith et al.*, 15

DEED. *Continued.*

RECITALS IN.

8. *Where inserted.*—There is no rule requiring a recital to appear in a particular portion of a deed. *Blaisdell v. Smith et al.*, 150

RESERVATION.

9. *Of vendor's lien.*—A recital in the *habendum* clause, "to have and to hold on payment of the notes hereinabove mentioned," is a sufficient reservation of a vendor's lien. *Blaisdell v. Smith et al.*, 150

DEFAULT.—See PRACTICE.

DEFENSES.—See PROMISSORY NOTES.

DEMURRER.—See CHANCERY—PLEADING.

DILIGENCE.—See CHANCERY.

DOGS.—See ANIMALS.

DRAINAGE.

DITCHES.

1. *Continuing trespass.*—Constructing ditches in such a manner as to collect the surface water and discharge it in streams upon the land of his neighbor, is a continuing nuisance, and successive actions may be brought and sustained as long as such nuisance is continued. *Mellor v. Pilgrim*, 476

2. *Flowing water upon lands of another.*—The owner of the superior estate cannot, by any act of his, acquire the right to collect surface water upon his land and discharge it upon the land of his neighbor in streams, or in any manner or quantity different from the natural flow. *Mellor v. Pilgrim*, 476

ELECTION.—See RAILROADS.

ESTOPPEL.

IN PAIS.

1. *Acts of the parties.*—Where the complainant and the sureties on his notes entered into an agreement for the payment of certain judgments rendered thereon, they are estopped to deny the validity of such judgments, on the ground that there was no sufficient power of attorney authorizing them to be entered. *Apperson v. Gogin et al.*, 43

2. *Justice of the peace.*—The judgments rendered by a justice, and afterwards collected by him, are collected by virtue of his office as justice, and he and his sureties are estopped to deny that fact. *The People v. Price*, 15

3. *Recitals.*—A bond reciting that it is issued by virtue of an act to incorporate the P. & D. R. R. Co., and in accordance with a vote of the town, will not conclude an inquiry into the performance of a condition that was to be performed after the bonds were issued. *Parker v. Smith et al.*, 356

4. *To deny incorporation.*—A subscriber to the capital stock of an incorporated company, when he participates in its organization and acts as director, is estopped from showing that the company failed to comply with the law in its organization. *Rutz v. Esler & Ropiequet Co.*, 83

EVICTIOn.—See ACTIONS.

EVIDENCE.

ADMISSIBILITY.

1. *Correspondence*.—Appellee being pressed for payment of a note, gave to the correspondent of appellants an order for the amount upon a third party, which was transmitted to appellants. In a suit against appellee for the amount due on the note, to which he pleaded delivery and acceptance of such order in payment, *held*, that in transmitting the order, he made the correspondent of appellants his agent, and the letters between appellants and such correspondent, relative to the transaction were admissible as evidence tending to show whether or not the order had been received and accepted in satisfaction of the debt. *Preston et al. v. Jones*, 632

ADMISSIONS.

2. *When competent*.—When an admission is made understandingly and deliberately, and is testified to by an intelligent, truthful witness, of good memory, such evidence is highly satisfactory. *Hartley v. Lybarger*, 524

BURDEN OF PROOF.

3. *Failure to pay over money by a justice*.—No presumption arises in favor of a justice, from the fact that he is a public officer, that he would do his duty and pay over money collected by him, so as to shift the burden of proof upon the party to whom the money is due. Proof that the money was received by the justice makes a *prima facie* case, and the burden is upon him to show that he paid it over. *The People v. Price*, 15

4. *In replevin*.—Where the defendant pleads property in himself, the burden of proof is upon the plaintiff to show his title or right to the possession. *McFarlan v. McClellan*, 295

5. *In support of judgment*.—It is a fundamental rule in judicial determinations that to enable a plaintiff to recover, he must support his alleged cause of action by a preponderance of testimony. *Wilson v. Higgins*, 288

6. *Partnership note*.—A note made by one partner in the firm name will be presumed to have been made in the course of partnership dealings, and the burden of proof is upon him who seeks to show the contrary. *Gregg v. Fisher*, 261

COMPETENCY.

7. *Certified copy of record*.—Our statute expressly provides, that upon the trial of any cause, any party may, by first complying with the provisions of the statute, read in evidence the record of any deed or a transcript thereof, certified by the proper recorder, with like effect as though the original of such deed was produced and read in evidence. *Dugger et al. v. Oglesby*, 94

8. *Death of one party*.—Where one of the defendants died during the pendency of the suit, the complainant was held incompetent to testify in his own behalf as to transactions occurring with such defendant previous to his death; and two of the other defendants, whose interest was in common with the complainant in the result of the suit, were also held incompetent. *Apperson v. Gogin et al.* 48

EVIDENCE.

COMPETENCY. *Continued.*

9. *Death of party*.—A party is prohibited by statute from testifying in his own behalf as to the state of accounts between himself and a deceased party, prior to the latter's death. *Lyon v. Lyon*, 434

10. *His widow cannot testify*.—The widow of a deceased party to a suit is not a competent witness to testify in relation to statements made by her deceased husband during his life in regard to his partnership business. *Sagar v. Eckert*, 412

11. *Docket of justice*.—The judgment docket of a justice, showing judgments recovered, in connection with testimony of the constable that he paid to the justice money collected on the same, are competent evidence in a suit against the justice and his sureties for failure to pay over money collected. *The People v. Price*, 15

12. *Failure to pay over funds*.—In a suit against a township treasurer for a failure to pay over to his successor money in his hands, evidence tending to show that funds of the district went into his hands as treasurer, and that he refused to pay over the same on demand, is admissible. *Trustees of Schools v. Stokes et al.*, 267

13. *In suits to recover forfeited tax*.—In such cases it is competent to give in evidence deeds tending to show that the defendant was owner of the land at time of assessment. *Smith v. The People*, 380

14. *Irrelevancy*.—The declaration containing no allegation or charge against the appellant, of negligence by reason of running the engine at a high rate of speed, it was error to admit evidence tending to show the speed with which the engine was running at the time of the alleged injury. *Ill. Cent. R. R. Co. v. Brookshire*, 225

15. *Of cost of repairs*.—A railroad by its charter was bound to restore a highway which it crossed in such a manner as not to impair its usefulness, but it not appearing how it was in any way bound to restore the bridge in question, it was error to admit evidence of how much it would probably cost to repair the bridge. *St. L. V. & T. H. R. R. Co. v. Town of Summit*, 155

16. *Of levy of execution*.—The defendant pleaded that he took the property in dispute by virtue of an execution in his hands as sheriff, and after reading the execution in evidence, offered to show that he took the property by virtue of such execution. The evidence was competent. *Johnson v. Sommers*, 55

17. *Part payment*.—The fact of part payment is admissible for the purpose of identifying the debt in reference to which an express promise to pay might be proved. *Willets v. Cotherson*, 644

18. *Suit on lost bond*.—In a suit upon a lost bond, evidence of the practice of the sheriff and others in respect to the form of bond used by them on other occasions, is wholly incompetent to prove the contents of the bond in suit. *Jackson v. Bry*, 586

GENERALLY.

19. *By-laws*.—An instruction that the only evidence as to what are the duties of an overseer or foreman, is the by-laws of the company relating to such duties, is not a correct statement of the law. *Du Quoin Mining Co. v. Thoricell*, 394

EVIDENCE.

GENERALLY. *Continued.*

20. *Insufficient to support judgment.*—Appellee claimed to recover of appellant for goods sold to one C. by her authority. The burden of proof was upon appellee to show that appellant authorized the purchase of the goods, and failing to establish that fact by a fair balance of testimony, the judgment is reversed. *Martins v. Green*, 626

21. *Of proceedings of board of directors.*—It is erroneous to instruct the jury that if the articles of association of the company require a written record to be kept of all proceedings of the board of directors, then unless such record is kept, oral evidence of the facts required to be kept cannot be considered. *Du Quoin Mining Co. v. Thorwell*, 394

HUSBAND AND WIFE.

22. *Testimony by.*—The statute allowing a husband and wife to testify for each other in certain cases, is in derogation of the common law, and parties cannot avail themselves of its privileges unless they come within its provisions. *Flynn v. Gardner*, 253

IMPEACHMENT.

23. *Province of jury.*—The jury have a right to believe a witness notwithstanding they may think his character bad, and the court ought not by an instruction, tell them that they should not do so. *Flansburg v. Basin*, 531

24. *Bad character.*—It is not allowed to impeach a witness by proof of general bad character. *Flansburg v. Basin*, 531

IN PARTICULAR ACTIONS.

25. *To recover forfeited tax.*—In a suit under the statute to recover the amount of a tax forfeited on real estate in order to support a personal action, there must first be a forfeiture, and it must be shown that all the steps necessary to such a forfeiture have been taken. There must have been a process of sale, an offer to sell, and a failure for want of bidders. *Smith v. The People*, 380; *Vetter v. The People*, 385

KIND OF PROOF.

26. *In slander.*—Strict proof of the words charged as slanderous is not required; the rule is that they shall be substantially proven. *McGregor v. Eakin*, 340

MEMORANDUM.

27. *When witness may refer to.*—A witness may refresh his memory by the use of a memorandum when he recollects having seen the writing before, and while the facts were fresh in his memory, though he has at the time of testifying no independent recollection of the facts mentioned in it, yet remembers that at the time he saw it he knew the contents to be correct. *Flynn v. Gardner*, 253

PAROL.

28. *Explaining a letter.*—A witness cannot be allowed to state what he meant in a written paper, unless there is some latent ambiguity, some sign or word having a peculiar significance, not generally understood. *Lyon v. Lyon*, 434

THINGS JUDICIALLY NOTICED.

29. *Incorporation of villages.*—Courts will take judicial notice of the

EVIDENCE.

THINGS JUDICIALLY NOTICED. *Continued.*

charter or incorporating act of a municipal corporation without it being specially pleaded, not only when it is declared to be a public act, but when it is public or general in its nature. *The People v. Wilson*, 368

EXCEPTIONS.—See BILL OF EXCEPTIONS.

BILL OF.

1. *What must appear.*—The motion for a new trial and affidavits upon which it is based, and the instructions complained of, should be preserved in a bill of exceptions. *Gregory v. Spencer*, 80

WHEN TO BE TAKEN.

2. *In the court below.*—Where it is desired to except in this court to the action of the court below in admitting testimony on the assessment of damages, the party objecting should have moved to set aside the assessment, and on refusal should have preserved an exception. *Beam et al. v. Laycock et al.*, 43

EXECUTION.

ISSUANCE.

1. *Not against municipal corporation.*—The statute prescribes the manner in which a judgment against a municipal corporation may be enforced, and it is error to award an execution on such judgment. *City of Cairo v. Allen*, 398

LEVY.

2. *Excessive.*—The mere receipt by the plaintiff in execution of the amount of his debt, without notice of the excessiveness of the levy, is not a ratification or approval of such excessiveness. *Buchanan v. Goeing et al.*, 635

3. *May amend before return.*—While an execution is in the hands of an officer, he may amend the return thereon. *Johnson v. Sommers*, 55

4. *Trespass.* The plaintiff in execution is liable for the acts of the constable in making a levy thereunder only so far as he aids, directs or authorizes them to be done, or approves of them afterwards as done in his interest, and if these acts are several, then only for such as he so aids, directs, authorizes or approves. *Buchanan v. Goeing et al.*, 635

FEES.—See INJUNCTIONS.

FENCES.—See RAILROADS.

FIXTURES.

BUILDING FOR TRADE PURPOSES.

1. *Not a fixture.*—A temporary building erected for the purposes of trade, and with the intention of removing the same, does not become a fixture. *Sagar v. Eckert*, 412

2. *Damages for removing.*—Where the party claiming damages for the removal of a building from the land, has only a life estate in the land, only such damages as were sustained to the life estate can be recovered. *Sagar v. Eckert*, 412

3. *Removal of.*—If the building was erected with an understanding

FIXTURES.**BUILDING FOR TRADE PURPOSES. Continued.**

had with the owner of the land, that it might be removed, it can be taken away after his death, if done within a reasonable time. *Sagar v. Eckert*, 412

GENERALLY.

4. *What passes under a mortgage.*—In determining what property was included in a mortgage, the mortgage, viewed in the light of the status of the property and the surrounding circumstances, must speak for itself as to what was included. The question whether certain articles are or are not fixtures, depends largely upon the intention of the party attaching them. *Jones v. Ramsey et al.*, 303

FORCIBLE ENTRY AND DETAINER.**GENERALLY.**

1. *Abandonment of premises.*—The removal by plaintiff of his goods from the rooms, is not of itself an abandonment of the premises; and declaring his purpose to fit them up for rent, and talking to parties about renting them, is a sufficient declaration of his intention to retain control over them, to contradict the theory of abandonment. *Knight v. Knight et al.*, 206

LEGAL TITLE.

2. *Cannot be tried.*—The legal title to the premises cannot be tried in this action. *Knight v. Knight et al.*, 206

WHAT WILL SUPPORT ACTION.

3. *Possession.*—Where the plaintiff is in the lawful possession of the premises, either as tenant by sufferance or otherwise, an entry made against his will or by force, is unlawful, and the action of forcible entry and detainer will lie. *Knight v. Knight et al.*, 206

FORCLOSURE.—See MORTGAGES.**FORFEITURE.—See REVENUE.****FORMER JUDGMENT.—See PLEADING.****WHEN NOT A BAR.**

1. *As to persons not parties.*—A judicial determination to which the heirs were not parties, and of which the grantees of their ancestor gave them no notice, does not, as to them, establish the fact of a divestiture of title. *Dugger et al. v. Oglesby*, 94

FRAUD.**DECLARATION IN ACTIONS OF.**

1. *Allegations of fraud.*—A declaration charged that the defendant falsely, fraudulently and deceitfully represented to the plaintiff that said business yielded \$2,000 per annum, and was and had been worth that much, etc., and then alleged that the said business was entirely worthless. *Held*, that this was not a sufficient traverse of the specific charges of fraud contained in the count. The denial must be by express contradiction in the terms of the allegation traversed. *Dwight v. Chase*, 67

FRAUD. *Continued.*

FRAUDULENT REPRESENTATIONS.

2. *Knowledge of falsity.*—It is the well settled doctrine in this State that there must be knowledge of the falsity of a statement to render it fraudulent. *Dwight v. Chase*, 67

3. *Procuring subscription to capital stock.*—Where a corporation sends out agents to procure subscriptions to its stock, and such subscriptions are obtained by fraudulent representations, the fraud may be set up in bar of a recovery on a suit for such subscriptions; but where subscriptions are procured by commissioners prior to the organization, their fraudulent representations constitute no defense to a suit for such subscriptions. They are not the agents of the company. *Rutz v. Esler & Ropeiquet Co.*, 83

4. *Statement as to value—When material.*—While it is the general doctrine that a mere statement as to the value of property, or as to its quality, is not evidence of legal fraud sufficient to justify a recovery on that ground, a representation falsely and fraudulently made, that a certain business yielded a stated income, is not the mere expression of an opinion as to value, but the false assertion of a material fact, intangible in its nature, and the truth of which was peculiarly within the knowledge of the vendor. *Dwight v. Chase*, 67

GENERALLY.

5. *In consideration of a note.*—Fraud in the consideration of a note cannot be set up against the claim of a *bona fide* purchaser for value before maturity, without tracing the knowledge of such fraud to him. *Taylor v. Thompson*, 109

FRAUDULENT REPRESENTATIONS.—See FRAUD.

GAMING.

WHAT IS NOT.

1. *Note given for entrance fee.*—The offer by an association of a purse of \$600, divided into four parts, to be given to the winning horse in a race to be run under the rules of the association, is not within the statute prohibiting gaming, and a note given for the entrance fee for one of the competing horses is not void under the statute as being a gaming contract. *Wilson et al. v. Conlin*, 517

GARNISHMENT.

FOUNDATION FOR PROCEEDINGS.

1. *Return of execution—Affidavit.*—To give the court jurisdiction in garnishment there must have been a return *nulla bona* of the execution, and a proper affidavit under the statute. *Gibbon v. Bryan*, 298

GENERALLY.

2. *Form of judgment.*—In garnishment the judgment should be in favor of the defendant in execution for the use of the plaintiff against the garnishee. *Gibbon v. Bryan*, 298

GIFT.—See CONSIDERATION.

GUARANTY.

OF NOTE.

1. *Written over blank indorsement.*—The holder of a promissory note has no authority to write a contract of guaranty over the name of an indorser, unless such act is the mere reducing to writing of a previously existing contract of guaranty. *Windheim v. Ohlendorf*, 496

HIGHWAYS.—See ROADS AND BRIDGES.

HUSBAND AND WIFE.

EVIDENCE.

1. *In favor of each other.*—The statute allowing a husband and wife to testify for each other in certain cases, is in derogation of the common law, and parties cannot avail themselves of its privileges unless they come within its provisions. *Flynn v. Gardner*, 253

SEPARATE MAINTENANCE.

2. *What necessary to action for.*—To support an action for separate maintenance, the complainant must be living apart from her husband, and she must be so living without fault on her part. *Jenkins v. Jenkins*, 641

SEPARATE PROPERTY OF WIFE.

3. *Keeping boarding house.*—Under some circumstances the business of keeping a boarding-house may, perhaps, be regarded as the separate property of the wife, but the fact that she makes the contracts for board and receives the pay therefor, is not sufficient to prove a separate property. The presumption would be, where the husband and wife live together, that the husband is the head of the family; that the expenses were borne by him; and that he received the profits derived from the boarders, and that his wife acted merely as his agent. *Flynn v. Gardner*, 253

IMPEACHMENT OF WITNESSES.—See EVIDENCE.

INJUNCTIONS.

DISSOLUTION.

1. *Assessing damages on.*—A failure to show in the record the testimony upon which an allowance of damages on dissolution of an injunction was made, is fatal to the decree assessing damages. *Wilson v. Weber*, 125
2. *Dismissing bill on motion.*—When the allegations of a bill are such that, if established, relief would be granted, the bill should be retained until a final hearing, and it is error to dismiss it on a motion to dissolve the injunction. *Wilson v. Weber*, 125
3. *Solicitors' fees.*—Where the solicitors for the defendants were the attorney-general and State's attorney of the several counties whose collectors were restrained, and, so far as shown, these officers were rendering *ex-officio* duties, it was error to make an allowance for their services as damages on dissolution of the injunction. *Wilson v. Weber*, 125

INJUNCTIONS. *Continued.*

TO ENJOIN PROCEEDINGS AT LAW.

4. *When refused.*—Courts of chancery will not on a bill filed by the plaintiff in an action at law, enjoin the defendant therein from making his defense to such action and yet allow the plaintiff to proceed. *Jones v. Ramsey et al.*, 303

TO RESTRAIN COLLECTION OF TAX.

5. *Legal part must be paid.*—A person seeking to enjoin the collection of a tax on the ground that a part is unauthorized, should show by his bill, as nearly as possible, what part is just, and what part unauthorized, and he should be required, as a condition of relief, to pay such amount as is just. *Wilson v. Weber*, 125

INJURIES.

TO THE PERSON.

1. *Remote cause.*—Where the bar-tender of a saloon keeper sold liquor to B, and in an altercation with him threw a glass, which missed B and injured a third person, it was held that the injury complained of was not in a legal sense the natural and proximate cause of the act of selling liquor to B, and an action would not lie therefor. It is a matter of speculation whether the same injury would not have been sustained if no liquor had been sold. *Lueken et al v. The People*, 375

INSTRUCTIONS.

ERRONEOUS.

1. *Assuming fact proved.*—An instruction which assumes that the defendant neglected to exercise ordinary care and diligence, when the fact of such neglect was contested, is erroneous. *Village of Warren v. Wright*, 602

2. *As to burden of proof.*—An instruction that the burden of proof is upon the defendant to establish his claim of set-off, though correct in that particular, was defective, because it left out of view that the burden of proof was upon the plaintiff in the first instance to show the original indebtedness, and the new promise to take the case out of the statute of limitations. *Nolan v. Vosburg*, 596

3. *Misreciting and undue prominence to testimony.*—An instruction which misrecites portions of the testimony, and which calls the attention of the jury to particular parts of the evidence, by italicising the same, is erroneous. *Hutchinson et al. v. Cruin et al.*, 20

4. *Weight of testimony.*—An instruction should not invade the province of the jury by directing them what weight should be given to the testimony of any witness. *Hartley v. Lybarger*, 524

RULE AS TO.

5. *Must state the law correctly.*—In cases where there may be doubt whether substantial justice has been done, each instruction of appellee or defendant in error must state the law correctly, or there should be a reversal. *Village of Warren v. Wright*, 602

INSURANCE.

FOREIGN COMPANIES.

1. *Service upon.*—Service of process upon a foreign insurance com.

INSURANCE.

FOREIGN COMPANIES. *Continued.*

pany, when such company has ceased doing business in this State, should be made upon the last designated agent of such company acting in the State. *Mich. State Ins. Co. v. Abens*, 488

JOINT LIABILITY.

INSTRUCTION.

1. *As to partnership.*—It was error to instruct the jury that if they believed that the defendants were not in fact partners, still if they acted as such, or held themselves out as partners, they should find for the plaintiff. The defendants were not sued as partners, nor was there any evidence to show that they acted as such. *Donnan v. Bang*, 400; *Donnan v. Gross*, 409

JUDGMENT.

FORM OF.

1. *In garnishment.*—The judgment should be in favor of the defendant in execution for the use of the plaintiff against the garnishee. *Gibbon v. Bryan*, 298

GENERALLY.

2. *Against one alone.*—In a suit against two, where both are served, it is error to render judgment against one, there being no default, assessment of damages, or other action against his co-defendant. *Logan v. Burr*, 458

3. *Must be against all.*—In some cases where a defendant interposes a personal plea, the jury may sever their finding, but where the defendants plead jointly, it is not error to instruct the jury that a judgment must be against all or none. *Hartley v. Lybarger*, 524

4. *Joint defendant.*—Where an action is against two jointly, one defendant answering and the other suffering default, it is error to render final judgment against the defendant in default, and take no proceedings against the other. *Waugh v. Suter et al.*, 271

JOINT TORT-FEASORS.

5. *Must be against all.*—A judgment at law must be a unit, and being erroneous as to one defendant, it must be reversed as to all. *Dally et al. v. Young*, 39

6. *Where issue undisposed of.*—It is error to render final judgment on demurrer while the issue on a plea of one defendant remains undisposed of. *Leach v. Elwood*, 453

MOTION IN ARREST.

7. *When not good.*—Where there is a good count in the declaration to support the judgment, a motion in arrest cannot prevail. *Waugh v. Suter et al.*, 271

REVIVING.

8. *Riens per descent.*—The statute authorizes the plea of *riens per descent* where a recovery is sought against the heir, for the indebtedness of the ancestor, but if the lands described in the *scire facias* to revive the judgment, had not descended to the heir, no judgment could be rendered

JUDGMENT.

REVIVING. *Continued.*

against him, and such plea would be improper. *Reynolds v. Dishon et al.*, 173

WHEN VOID.

9. *For want of proper service.*—The return upon the summons not showing a proper service upon the defendant, the judgment is void. *St. L. V. & T. H. R. R. Co. v. Dawson*, 118

JURY.—See INSTRUCTIONS.

GENERALLY.

1. *Taking papers, etc.*—A jury cannot be permitted, on retiring, to take with them books or papers not introduced as evidence on the trial, unless by consent of parties. *Nolan v. Vosburg*, 596

VERDICT.

2. *Polling jury.*—Either party has the undoubted right to have the jurors called individually, and inquire as to whether the verdict returned is his verdict. *Crotty v. Wyatt*, 383

3. *Returning.*—The verdict must be returned in open court by the entire panel; it is not final until pronounced in open court, and recorded. *Crotty v. Wyatt*, 383

4. *Sealing.*—A direction to a jury to seal their verdict and separate, does not dispense with their personal attendance when the verdict is opened, or deprive either party of the right of polling the jury. *Crotty v. Wyatt*, 383

JURISDICTION.

IN CHANCERY.

1. *When once obtained.*—When equity obtains jurisdiction it will do complete justice between the parties under the contract, and adjust all questions arising under it. *Apperson v. Gogin et al.*, 48

JUSTICE OF THE PEACE.

DUTIES.

1. *Failure to deliver papers.*—The duty of delivering to the person entitled thereto all papers in his hands as an officer, upon proper demand therefor, is expressly enjoined by the statute upon a justice of the peace, and for a failure to do so he and his sureties are liable. *Hays et al. v. The People*, 57

2. *Must pay over collections.*—It is the duty of a justice of the peace to pay over all moneys that may come to his hands under any judgment, or otherwise by virtue of his office, subsequently to the commencement of his term of office, regardless of the time when the claims were received by him for collection. *The People v. Price*, 15

DOCKET.

3. *As evidence.*—The judgment docket of the justice, showing the two judgments in favor of appellants, and the testimony of the constable tending to show that he paid them to the justice, are competent evidence in a suit against him for failure to pay over money collected. *The People v. Price*, 15

JUSTICE OF THE PEACE.

DOCKET. *Continued.*

4. *Dockets, etc., turned over.*—When one justice retires and another succeeds to his office, the docket and all papers pertaining to his office, should be turned over to the latter, who should proceed to the completion of all unfinished business. *The People v. Price,* 15

GENERALLY.

5. *Estoppel.*—The judgments rendered by the justice and afterwards collected by him, were collected by virtue of his office, and the justice and his sureties are estopped to deny that fact. *The People v. Price,* 15

6. *Evidence that money was received—Burden of proof.*—No presumption arises from the fact of the justice being a public officer, that he would do his duty and pay over money collected, so as to throw the burden of proof upon the party claiming that the money had not been paid over. Proof that the money was received by the justice makes a *prima facie* case, and the burden is upon him to show what has been done with it. *The People v. Price,* 15

7. *Measure of damages on failure to deliver papers.*—For a failure to deliver up, when demanded, securities left with him for collection, the justice would be liable for all loss sustained by the owner. But where the evidence showed that at the time the justice received the note in question, and ever since, the makers were wholly insolvent, the plaintiff would be entitled to recover nominal damages, and beyond that only the actual value of the note. *Hays et al. v. The People,* 57

SUMMONS.

8. *Amount indorsed.*—A plaintiff can recover no more than the amount indorsed upon the summons. *Bullock v. Carpenter,* 462

JUSTIFICATION.—See SLANDER.

LEGISLATURE.

POWER TO ENACT LAWS.

1. *Curative acts.*—Where an election had under an existing law, for making subscription in aid of a railroad, was void because of being called by the wrong authority, the legislature had no power to enact a law rendering such election and subscription valid. *County of Richland et al. v. The People ex rel.,* 210

LEVY.—See ATTACHMENT—EXECUTION—PROCESS.

LICENSE.—See CITIES AND VILLAGES—CONVEYANCES.

LIEN.

FOR MATERIALS.

1. *Claims due each creditor.*—In proceedings to enforce a lien for materials furnished, if there are other creditors or incumbancers the court should find the amount due each, and direct the application of the proceeds of sale to be made to each in proportion to their several amounts. *Ogle et. al v. Murray,* 348

VENDOR'S.

2. *Enforcement by assignee of note.*—When a vendor's lien is

LIEN.

VENDOR'S. *Continued.*

reserved in a deed, the right to enforce such lien passes to the assignee of the note executed for the purchase money. *Blaisdell v. Smith*, 150

3. *Reservation in deed—Notice.*—A vendor may reserve in a deed, a lien which he can enforce in equity against subsequent purchasers or incumbrancers; and a deed containing a description of the notes given for the purchase money, and a recital "to have and to hold on payment of the notes herein above stated," is a sufficient reservation of a vendor's lien. *Blaisdell v. Smith et al.*, 150

LIQUORS.

SALE.

1. *Injuries arising from.*—Liquor was sold to B, who engaged in a quarrel with the bar-tender. In the quarrel a glass was thrown at B, which missed him but injured appellee. *Held*, that the injury was not in a legal sense the natural and proximate result of the act of selling liquor, so as to raise a cause of action under the statute; that it was a matter of speculation whether the same injury would not have happened if no liquor had been sold. *Leuken et al. v. The People*, 375

MALICE.—See MALICIOUS PROSECUTION.

MALICIOUS PROSECUTION.

PRINCIPAL AND AGENT.

1. *Acts of agent.*—A principal will not be liable for the acts of his agent in instituting a criminal prosecution, unless with knowledge of all the circumstances, he adopts and continues such prosecution. *Dally et al. v. Young*, 39

PROBABLE CAUSE.

2. *Conviction not necessary.* In cases of malicious prosecution, it is not necessary for the protection of the prosecutor, that the person charged with an offense should be convicted. It is enough that there is a reasonable ground to believe the party guilty as charged, and that the prosecutor acts with caution and without malice. *Cox v. McLean*, 45

WHEN ACTION LIES.

3. *Malice and probable cause.*—The action for malicious prosecution can only be sustained when the prosecutor acts from malice and without probable cause. *Cox v. McLean*, 45

MANDAMUS.

WHEN WRIT NOT AWARDED.

1. *To compel granting of license.*—A party tendering the amount fixed to be paid for a license, by a resolution of the board of trustees of a village, and a bond, is not thereby entitled to a peremptory writ of mandamus compelling the village to issue a license to him. *Village of Crotty v. The People*, 465

MASTER IN CHANCERY.—See OFFICER.

MISTAKE.—See CHANCERY.

MORTGAGE.

FORECLOSURE.

1. *By proceedings in court.*—Where a mortgage is foreclosed by proceedings in court, such foreclosure must be in conformity with the statute, though the deed conferred power upon the trustee to sell, and the court has no authority to substitute another trustee in place of the one named by the parties, and order a sale within thirty days, without equity of redemption. *Jones v. Ramsey et al.*, 303

2. *Covenant against incumbrances.*—Where the owner of land granted by deed the right to flow the land, and subsequently conveyed to another the title in fee of such land, receiving back a mortgage to secure the deferred payments, forecloses such mortgage for non-payment of certain of the notes, his grantee, as defendant in such foreclosure, may have the amount of damages sustained by him by reason of such flowage applied in reduction of the notes due and to become due; such an easement constitutes a breach of the covenant against incumbrances, and is a proper defense to the notes. *Patterson v. Sweet*, 550

3. *Parties in interest.*—The assignee of the equity of redemption, though he may have assumed payment of the mortgage, has such an interest that he may object to a decree requiring him to pay the whole sum in thirty days. It is his right to pay off the indebtedness as it falls due, and he cannot be required to pay it except as stated in the deed. *Jones v. Ramsey et al.*, 303

4. *Whole sum to become due.*—A mortgage providing that "in case of default in payment of said note above mentioned, or any part thereof," the trustee might advertise and sell the premises and apply the proceeds to the payment of the amount due on said note, does not make the whole sum due on default in payment of interest, and the trustee cannot sell and apply the proceeds on notes not due, nor can the court decree a sale of the premises subject to the lien of the unpaid balance. *Jones v. Ramsey et al.*, 303

PAYMENT.

5. *Presumption.*—After the lapse of twenty years, in the absence of proof to the contrary, a mortgage will be presumed to have been satisfied. *Blaisdell v. Smith et al.*, 150

REDEMPTION.

6. *Presumption.*—After the lapse of twenty years, no conveyance to the purchaser under the foreclosure sale having been made, the land will be presumed to have been redeemed from such sale. *Reynolds v. Dishon et al.*, 173

MUNICIPAL BONDS.

CONDITIONS.

1. *Imposed by town.*—The statute of 1869 giving to towns the right to prescribe conditions upon which subscriptions should be made or bonds issued, and declaring that such subscriptions or bonds should not be valid until the conditions shall have been complied with, applies to the bonds under all circumstances, in whosoever hands they may be. *Parker et al. v. Smith et al.*, 356

MUNICIPAL BONDS. *Continued.*

IN AID OF RAILROAD.

2. *Conditions of subscription.*—Where the conditions upon which a town was authorized to subscribe for stock in a railroad, were that such road should be built through the township, within one-half mile of the court house, and should terminate at or near the city of V., the building of a road across one corner of such township and terminating at a small village nine miles from V., is not a substantial compliance with the conditions of the vote, and bonds issued in pursuance of such vote are invalid, and no tax can be collected to pay interest thereon, though they may be in the hands of innocent holders. *Parker et al. v. Smith et al.*, 356

RECITALS.

3. *Character of estoppel by.*—A bond reciting that it is issued by virtue of an act to incorporate the P. & D. R. R. Co. and in accordance with the vote of the electors of said town, although it may preclude an inquiry as to whether an election was held and a vote authorizing the bonds to issue, yet it could not conclude an inquiry into the performance of a condition that was to be performed after the bonds were issued. *Parker et al. v. Smith et al.*, 356

MUNICIPAL CORPORATIONS.—See CITIES AND VILLAGES.

CITIES.

1. *Authority of officer to make purchases.*—One member of the city council cannot, without the concurrence of the other members of the committee, or a majority of them, authorize the purchase of an article for the use of the city. *City of Anna v. O'Callahan*, 176

2. *Officer interested in contract.*—If a municipal officer contracted to furnish an article to the city, and had an interest in its sale, he would come within the prohibition of the statute forbidding such contracts by an officer, but if he only ordered the article by authority of the city and advanced the money to pay for it, he would not. *City of Anna v. O'Callahan*, 176

EXECUTION AGAINST.

3. *Cannot be awarded.*—It is error to award an execution on a judgment against a municipal corporation. The statute prescribes the manner of collecting such judgments. *City of Cairo v. Allen*, 398

NEGLIGENCE.

A QUESTION FOR THE JURY.

1. *Rule as to.*—What constitutes ordinary diligence, and what is negligence, are questions to be answered by the jury; but courts are bound to see that these facts, when found by the jury, rest upon evidence. *Ill. Cent. R. R. Co. v. Brookshire*, 225

COMPARATIVE.

2. *Rule.*—Notwithstanding the party injured may have been guilty of only slight negligence, if that of the defendant in comparison amounts to gross carelessness, the plaintiff would not be debarred from recovery; but, if the person injured failed at the time to use that care

NEGLIGENCE.

COMPARATIVE. *Continued.*

which a man of ordinary prudence would have exercised under like circumstances, then no recovery can be had, unless the negligence of defendant was so gross as to amount to a wanton or willful wrong. *C. B. & Q. R. R. Co. v. Colwell*, 545

CONTRIBUTORY.

3. *Comparison.*—Where the plaintiff's own act contributed to the injury, he cannot recover, unless his negligence was slight and that of the defendant gross in comparison. *Ill. Cent. R. R. Co. v. Brookshire*, 225

RESPONDEAT SUPERIOR.

4. *Seeking unsafe position.*—An instruction which tells the jury that if the deceased, at the time of the injury was exercising ordinary care and prudence, etc., then plaintiff is entitled to recover, is erroneous, because it ignores the fact whether deceased exercised ordinary care in venturing upon a prohibited and dangerous place in the first instance. *C. B. & Q. R. R. Co. v. Colwell*, 545

5. *Liability of city for acts of servant.*—Where it is sought to charge a city for an injury received in consequence of the negligence of one of its servants, it must be shown that the person performing the act was the servant of the city in respect of the thing done, and that by reason of his carelessness or unskillfulness the plaintiff received the injury complained of. *City of East St. Louis v. Klug*, 90; *City of East St. Louis v. Giblein*, 219

NEW PROMISE.

AFTER BANKRUPTCY.

1. *What necessary to revive a debt.*—To revive a debt barred by a discharge in bankruptcy, the promise to pay must be shown to be clear, distinct, unequivocal and express. Neither payment of interest nor part payment of principal, nor declaration of intention to pay, will suffice. *Willets v. Cotherson*, 644

2. *Part payment as evidence.*—The fact of part payment would be admissible for the purpose of identifying the debt in reference to which an express promise to pay, otherwise of uncertain application, might be proved, but not as tending of itself to prove a sufficient promise to pay the balance. *Willets v. Cotherson*, 644

NOTICE.—See CITIES AND VILLAGES.

OF MOTION.

1. *Should be given.*—It is error to set aside a general order of continuance, in the absence of the opposite party, and without notice of any intended application therefor. *Newell v. Clodfelter et al.*, 259

SUFFICIENCY.

2. *Reservation in deed.*—A recital in the *habendum* clause of a deed "to have and to hold on the payment of the notes hereinabove stated" is sufficient to put a reasonable person upon inquiry as to the reservation of a vendor's lien, and the payment of the notes mentioned. *Blairdell v. Smith et al.*, 150

OFFICER.

ESTOPPEL.

1. *To deny official acts.*—Where a justice renders judgment, and afterwards collects money on the same, he and his sureties on his bond are estopped to deny that the same was received by virtue of his office. *The People v. Price*, 15

GOING OUT OF OFFICE.

2. *Justice of the peace—Successor.*—When one justice retires, and another succeeds to his office, it is his duty to turn over to his successor all dockets, books, papers, etc., pertaining to his office. *The People v. Price*, 15

MASTER IN CHANCERY.

3. *Failure to pay over money.*—To an action against a master in chancery for failure to pay over money received on a sale of lands under partition, it was objected that plaintiffs failed to show that the partition proceedings were in chancery. It was held that the proceedings showed that the partition suit was treated by the parties as a chancery suit, and the plaintiffs should not be defeated of their right to recover by such an objection; that the distinction is so nice between the statutory proceeding for partition and in chancery, that the court in order to uphold the jurisdiction in a collateral proceeding, will refer the case to the law or chancery side, as may be necessary. *The People v. McLain et al.*, 27

VACATION OF OFFICE.

4. *Election not necessarily a.*—The fact that a person illegally elected to a municipal office, takes the oath and files his official bond, is not *ipso facto* a vacation of a former valid appointment to the same office, nor is he by such acts estopped from averring that he did not accept the office and enter upon the duties conferred by the void election. *Forristal v. The People*, 470
5. *Holding over.*—If he did not accept the office under the void election, there was nothing to prevent him from continuing to act under the previous valid appointment until his successor was duly elected and qualified. *Forristal v. The People*, 470

OFFICIAL BONDS.

SUIT ON.

- Variance.*—A declaration upon a bond, alleging its execution by the principal and sureties, is not supported by proof of one executed by the sureties alone. *Reitz v. Board of Trustees*, 448

SURETIES.

1. *Estoppel.*—The judgments rendered by a justice, and collection of money on the same, are official acts, and the sureties on his official bond are estopped from saying that they are not. *The People v. Price*, 15
2. *Liability.*—The liability of a surety is not to be extended by implication beyond the terms of his contract. The undertaking of a surety on the official bond of a township treasurer, is that the principal shall pay over to his successor all moneys in his hands as such treasurer during his term of office; but he is not liable for the wrongful acts of the treasurer prior to the execution of the bond. *McIntire et al. v. Trustees of Schools*, 77

ORDER FOR PAYMENT OF MONEY.—See ASSIGNMENT.

ORDINANCES.—See CITIES AND VILLAGES.

OUSTER.

BY MORTGAGEE.

1. *Suit on general covenants*.—In this State, on the principle that the mortgagee is the owner of the fee, he can maintain ejectment, but where he resorts to a court of equity to foreclose and sell, the purchaser under the decree, without a deed, cannot assert a hostile title to which the plaintiff could rightfully succumb. The plaintiff's title must be defeated by a paramount legal title under which he could oust the plaintiff. The foreclosure sale, deed and eviction, should all be shown in an action against the grantor on his covenants. *Dugger et al., v. Oglesby*, 94

OF GRANTEE.

2. *Notice to grantor*.—Where a grantee is ousted under a legal proceeding to which his grantor is not a party, he must give notice of such proceeding to his grantor, or else, in a subsequent suit against his grantor on the covenants of his deed, he must show the validity of the title of him by whom he was ousted. *Dugger et al. v. Oglesby*, 94

PARENT AND CHILD.

MINOR.

1. *Service after majority*.—If a child remains with a parent after arriving at majority, in the same apparent situation as when a minor, in the absence of a contract, no recovery can be had for services rendered by him. *Cooper v. Cooper*, 492

SERVICE OF CHILD.

2. *After majority*.—The mere fact that a child lives with her parents after reaching majority, raises no obligation to pay for services thereafter rendered, and such services cannot be presumed to constitute a consideration for a note given long after. *Arnold et al. v. Franklin*, 141

PARTIES.

IN PARTICULAR ACTIONS.

1. *Administrator—Widow*.—In a proceeding to enforce payment of a claim against an estate, the administrator is necessarily a defendant. The assets in his hands are primarily liable for the debts of the deceased, and the widow is properly a party defendant, she being an heir, at least to the extent of one-third of the personal property. *Dugger et al. v. Oglesby*, 94

PARTNERSHIP.

PARTNERS.

1. *Misapplication of funds*.—A misapplication by one partner of the funds borrowed, constitutes no defense to a suit for payment of the note, unless it be shown that the plaintiff at the time he loaned the money had knowledge that the same was to be used for other than partnership purposes. *Gregg v. Fisher*, 261

2. *Partnership note*.—A note or bill made by one partner in the name of the firm, will be presumed to have been made in the course of part-

PARTNERSHIP.

PARTNERS. *Continued.*

nership dealings, and the burden of proof is upon him who seeks to impeach it, to show the contrary, and that such fact was known to the payee. *Gregg v. Fisher*, 261

3. *Power of one to bind the firm.*—In ordinary commercial partnerships each partner has the right to pledge the partnership property, borrow money and give notes for partnership purposes, in the firm name, and when credit is extended to a partnership within the scope of its business, it will bind all the partners, notwithstanding any secret arrangement they may have among themselves, unknown to those giving credit. *Gregg v. Fisher*, 261

PAYMENT.—See SCHOOLS.

APPLICATION.

1. *When not made.*—In the absence of any agreement between the parties to make the application of an open, unstated account between them, in payment of notes held by one against the other, no such application should be made. *Stanwood v. Smith*, 647

OF PROMISSORY NOTE.

2. *Care.*—A party paying negotiable paper should see to it that he pays to one who is the holder thereof at the time payment is made; he should ask to see the note before he makes the payment, and should take it up when paid. *McClelland v. Bartlett et al.*, 481

ORDER ON THIRD PARTY.

3. *Not a payment, when.*—Appellee being sued as indorser of a promissory note, pleaded payment by delivering an acceptance of an order for the amount upon a third party. It appeared that when payment was demanded, appellee sent an order for the amount upon a third party, which appellants received, but failing to collect of the drawer, detained until suit was brought when it was produced on the trial. *Held*, that these facts raised no presumption that appellants received the order in full satisfaction of the amount due on the note. *Preston et al. v. Jones*, 632

PARTIAL.

4. *To revive a debt barred.*—Neither payment of interest, part payment of principal, nor declaration of intention to pay, will suffice to revive a debt barred by discharge in bankruptcy. *Willetts v. Cotherson*, 644

PRESUMPTION OF.

5. *After lapse of time.*—After the lapse of twenty years a mortgage will be presumed to have been satisfied, in the absence of proof to the contrary. *Blaisdell v. Smith et al.*, 150

PLEADING.—See CHANCERY.

ALLEGATION.

1. *Traverse of.*—In a declaration charging fraudulent representations, and alleging their falsity, the denial must be by express contradiction in the terms of the allegation traversed. *Dwight v. Chase*, 67

AMENDMENT.

2. *Plea in abatement.*—A plea in abatement is not amendable, unless

PLEADING.

AMENDMENT. *Continued.*

it goes to the merits of the action, as a plea to the jurisdiction. *Dunaway v. Goodall et al.*, 197

DECLARATION.

3. *Averment of incorporation.*—An averment in the declaration that the appellee was collector of the town of N., and as such collector, received the collector's books and did collect the taxes extended on the books of said town against persons residing "within the incorporate limits of the town of F.," is a sufficient averment on demurrer, that the town of F. was possessed of corporate powers. *The People v. Wilson*, 368

4. *On a bond.*—The condition of the bond was to pay such damages as should be awarded against the First National Bank for wrongfully suing out the attachment, etc., and the declaration failing to aver that any damages had been awarded against the bank, it was defective, and the demurrer should have been sustained. *Wilson et al. v. Isom*, 246

DEMURRER.

5. *Special.*—Questions relating to the form of a plea can be reached only by special demurrer. *Adams Ex. Co. v. King*, 316

DIFFERENT KINDS OF PLEAS.

6. *Riens per descent.*—In proceedings against an heir to revive a judgment against his ancestor, if the lands described in the *scire facias*, have not descended to the heir, no judgment can be had against him, and the plea of *riens per descent* is improper. *Reynolds v. Dishon et al.*, 173

GENERALLY.

7. *Infancy.*—In an action in the common counts for money paid, etc., the defendant pleaded that the supposed cause of action was for a one-third part of certain judgments paid by plaintiff, which judgments were rendered by confession against defendant and others upon certain promissory notes with warrants of attorney, and that at the time of executing the notes and warrants of attorney the defendant was a minor, etc. Held that the declaration being upon an implied promise to pay his proportion of such judgments, this was a sufficient answer to the declaration, though not averring infancy at the time of the promise alleged in the declaration. *Finn v. Finn*, 615

8. *Non-residence of defendant.*—It is not necessary to aver in a declaration the non-residence of a defendant, and such averment, if made, is not traversable. *Adams Ex. Co. v. King*, 316

9. *Set-off.*—A plea of set-off is in the nature of a cross-action, and under a general replication to such plea, evidence may be given that the subject-matter of the set-off is a partnership asset between plaintiff and defendant. *Bennett v. Pulliam*, 185

10. *Statute of limitations.*—A plea of the statute of limitations in bar to an action on an unwritten contract, is sufficient if it alleges a lapse of ten years instead of five; the greater includes the lesser. *Adams Ex. Co. v. King*, 316

11. *Evidence.*—Under a plea of property in defendant, the defendant

PLEADING.

GENERALLY. *Continued.*

may show by what means he came into possession of the property, and his title thereto. *McFarlan v. McClellan*, 295

TRESPASS AND CASE.

12. *How far distinction abolished.*—Although the statute has abolished the technical distinction between these actions, it does not affect the substantial rights of the parties so as to give any other remedy for acts done than such as before existed; nor does it abrogate the well settled rule that the proof must correspond to the allegation. *St. L. V. & T. H. R. R. Co. v. Town of Summit*, 155

VARIANCE.

13. *In suit on bond.*—A declaration upon a bond alleging its execution by the principal and sureties, is not supported by proof of one executed by the sureties alone. *Reitz et al. Board of Trustees*, 448

WHAT SHOULD BE ALLEGED.

14. *Decree of court.*—A plea which seeks to divest a plaintiff of her legal title to lands, by setting up a judicial conveyance to another, is defective if it fails to show a decree against the plaintiff authorizing such conveyance. The decretal order should be pleaded in order to show that the plaintiff was a party to and bound by it. *Hutches et al. v. Adams*, 42

PRACTICE.—See CHANCERY.

ADVANCING CAUSE.

1. *Five-day rule.*—The rule of the Superior Court of Cook County, known as the "five-day rule," providing for the advancement of certain causes and their trial out of the regular order on the docket, is in violation of the statute regulating practice. *Brown v. Davis*, 639

AFFIDAVIT OF MERITS.

2. *Plea denying joint liability.*—Appellants being sued as co-partners, with their plea of the general issue, filed pleas verified by affidavit, denying joint liability. On motion, these pleas were stricken from the files for want of an affidavit of merits. *Held*, that the affidavits verifying the pleas denying joint liability showed a defense to the entire cause of action, and were a sufficient compliance with the statute requiring defendants to file an affidavit of merits with their plea. *Fergus v. Cleveland Paper Co.*, 629

APPEALS.

3. *Further time to file record.*—A motion for further time in which to file the record on appeal, should be made within the time limited by rule for filing records. *Simpson v. Simpson et al.*, 432

4. *Must be from final judgment.*—Where there is no final judgment of the court below, a writ of error will not lie. *Com'rs of Highways v. Village of Rock Falls*, 464; *The People v. Neal et al.*, 181

5. *To appellate court.*—A suit under the statute to recover the amount of tax due upon forfeited real estate, is a common law action within the meaning of the statute requiring appeals from the County Court in common law actions to be taken to the Appellate Court. *West et al. v. The People*, 877

PRACTICE. *Continued.*

CORRECTING MISTAKE IN A RECORD.

6. *By motion or bill in chancery.*—Where the parties to the record seek a correction, it may be made upon motion and proper notice in the court where the mistake occurred, but this rule does not apply to one who was not a party to the record, and was not chargeable with notice of the mistake. In such case the party may seek relief in chancery. *Edwards v. Sams et al.*, 168

DEFAULT.

7. *Evidence in reduction of damages.*—Though a default has been taken against a defendant, he has the right to appear and introduce evidence tending to reduce the amount claimed by the plaintiff. *Knebelcamp v. Smith et al.*, 243

8. *In joint actions.*—Where an action was against two jointly, one defendant answering and the other suffering default, the issue as to the defendant who pleaded should have been tried, and the same jury should have assessed the damages against both. The defendant in default has a substantial interest in having the judgment joint as to himself and co-defendant, as it might be immediately enforced against him; and it is error to render final judgment as to him and take no proceedings against the other. *Waugh v. Suter et al.*, 271

9. *Motion to set aside.*—A motion to set aside a default is addressed to the discretion of the court, and will not be reviewed unless that discretion has been abused. But such motion should disclose a meritorious defense and reasonable diligence in making it. Although the question of a meritorious defense is the most important, yet in this case the diligence shown is not such as would justify the court in reviewing the case on that ground. *Waugh v. Suter et al.*, 271

DEMURRER.

9. *In chancery—General.*—On a general demurrer to a bill in chancery, if the complainant is entitled to any relief on the case made by his bill, the demurrer should be overruled. *Crane et al. v. Hutchinson et al.*, 30

EXCEPTIONS.

10. *Must show affidavits.*—The bill of exceptions must contain the affidavits read on motion for new trial, and the instructions given and refused, or they will not be noticed in the appellate court. *Rockefeller et al. v. Tobias et al.*, 461

11. *Requisites of bill.*—The bill of exceptions must purport to contain all the evidence. *Bulmer v. Worthing et al.*, 460

12. *To evidence.*—Where exception is desired to be taken in this court to the admission of improper evidence in the court below on assessment of damages, the party objecting should move to set aside the assessment, and on refusal should preserve an exception. *Beam et al. v. Laycock et al.*, 43

13. *What must appear in bill of.*—The motion for new trial and affidavits upon which it is based, as well as the instructions complained of, should be preserved in a bill of exceptions, or this court will not review the action of the court below. Being copied into the record by the clerk is not sufficient. *Gregory v. Spencer*, 80

PRACTICE. *Continued.*

FORM OF JUDGMENT.

14. *In particular actions.*—In a suit against the administrator, widow and heirs of a decedent for the payment of a debt from assets received by them, the judgment should be *in solido* against them, the order as to the administrator should be *quando acciderint*, and the widow and heirs should be subjected to no greater liability than the value of the estate that descended to them, exclusive of the widow's award, and the court should ascertain this value. *Dugger et al. v. Oglesby*, 92

GENERALLY.

15. *Amount endorsed on summons.*—A plaintiff is limited in his recovery, in actions originating before a justice of the peace, to the amount endorsed upon the summons. *Bullock v. Carpenter*, 462

16. *Evidence after argument.*—The refusal of the court to allow the defendant to testify after the argument had proceeded, was a proper exercise of discretion. *Windheim v. Ohlendorf*, 434

IN CHANCERY.

17. *Default.*—It is error to enter a default against defendants while their answers are on file. *Apperson v. Gogin et al.*, 481

18. *Dismissing bill on motion.*—Where the allegations of a bill are such that, if established, relief would be granted, the bill should be retained until a final hearing, and it is error to dismiss the cause on a motion to dissolve an injunction. *Wilson v. Weber*, 125

19. *Evidence preserved in the record.*—The evidence or facts on which a decree in chancery is based must appear somewhere in the record. If they are already a part of the record by being contained in the master's report, or in depositions taken as the law requires, or in exhibits, or by a certificate of evidence, it is sufficient. If not thus preserved, they must appear on the face of the decree. *Bonnell v. Lewis*, 283

20. *Exception to rule.*—Proceedings for a mechanic's lien are an exception to the rule above stated. So, also, where the decree is based upon the verdict of a jury in an issue out of chancery, the evidence heard by the jury need not be preserved in the record. But if the court should enter up a decree contrary to the verdict, such decree must be sustained by evidence contained in the record. *Bonnell v. Lewis*, 283

JOINT LIABILITY.

21. *Denial of*—The statute requiring a denial of joint liability to be made under oath, is not intended to preclude the defendants from giving evidence on the trial, showing that they are not jointly liable, but only to relieve the plaintiff from proving a joint liability in the first instance. *Donnan v. Bayg*, 400

JUDGMENT.

22. *Against one defendant alone.*—In a suit against two, where both are served, it is error to render judgment against one, there being no default, assessment of damages, or other action against his co-defendant. *Logan v. Burr*, 458

23. *Must be against all.*—A judgment at law must be against all the defendants. *Dally et al. v. Young*, 39

24. *Where defense is personal.*—In some cases, where a defendant

PRACTICE.

JUDGMENT. *Continued.*

interposes a personal plea, the jury may sever their finding, but when defendants plead jointly, it is not error to instruct the jury that a judgment must be against all or none.—*Hartley v. Lybarger*, 524

25. *Where issue undisposed of.*—It is error to render final judgment on demurrer while the issue on a plea of one defendant remains undisposed of. *Leach v. Elwood*, 453

MOTION IN ARREST OF JUDGMENT.

26. *When not good*—Where there is a good count in the declaration to support the judgment, a motion in arrest cannot prevail. *Waugh v. Suter et al.*, 271

PREMATURE ACTION.

27. *Objection.*—An objection that the demand sued upon had not matured at the time of bringing suit, may be made on the trial; it need not be raised by plea in abatement. *Collins v. Montemey*, 182

RECORD.

28. *On appeal.*—The affidavits in support of a motion for new trial and instructions complained of must appear by bill of exceptions. Being copied into the record by the clerk does not make them a part of the record. *Gregory v. Spencer*, 80

RULE OF COURT.

29. *Rights of parties.*—A rule of court cannot deprive a party of a substantial legal right unless it has in some manner become forfeited under such rule. *Crotty v. Wyatt*, 388

SETTING ASIDE ORDER.

30. *Notice to be given.*—After a general order of continuance has been entered in a cause, it is error to set aside such order in the absence of the opposite party, no notice having been given him of any intended application therefor. *Newell v. Clodfelter et al.*, 259

STRIKING PLEA FROM FILES.

31. *Refusal to answer further.*—A plea of *nil debet* being improper, and no answer to the declaration, it was proper to strike it from the files, and the defendant refusing to plead further, it was not error to render judgment *nil dicit*. *Beam et al. v. Laycock et al.*, 43

VERDICT.

32. *Returning—Polling jury.*—The verdict of a jury must be returned in open court by the entire panel, and either party has the right to poll the jury. A verdict is not final until pronounced in open court and recorded. *Crotty v. Wyatt*, 388

33. *Sealed.*—A direction to a jury to seal their verdict and separate, does not dispense with their personal attendance in court when the verdict is opened, or deprive either party of the right of polling the jury. *Crotty v. Wyatt*, 388

WRIT OF ERROR.

34. *Final order.*—There must be a final disposition of the case as to all parties, or a writ of error will not lie. *The People v. McFarland*, 237

PREFERENCE.—See DEBTOR AND CREDITOR.

PRESCRIPTION.—See **ROADS AND BRIDGES.**

PRESUMPTION.

OF JURISDICTION.

1. *In proceedings under statutes.*—While the Circuit Court is a court of general jurisdiction, and entitled to all presumptions in favor of its common law jurisdiction, this presumption ceases when it undertakes to administer a statute passed in derogation of the common law. *Gibbon v. Bryan*, 298

OF LAW.

2. *Intervening rights.*—In a proceeding to correct a mistake in the record of a court, the law will not presume that rights of third parties have intervened, and such fact need not be negatived in the bill of complaint. *Eduards v. Sams et al.*, 168

3. *Partnership note.*—A note made by one partner in the name of the firm, will be presumed to have been made in the course of the partnership dealings, and the burden of proof is upon him who seeks to impeach it, to show the contrary, and that such fact was within the knowledge of the payee. *Gregg v. Fisher*, 261

OF PAYMENT.

4. *As to mortgage.*—After the lapse of twenty years, in the absence of proof to the contrary, a mortgage will be presumed to have been satisfied. *Blaisdell v. Smith et al.*, 150

OF REDEMPTION.

5. *From foreclosure sale.*—After the lapse of nearly twenty years, no conveyance to the purchaser having been made, it will be presumed that the land has been redeemed from such sale. *Reynolds v. Dishon et al.*, 173

PROBABLE CAUSE.—See **MALICIOUS PROSECUTION.**

PROCESS.—See **EXECUTION.**

LEVY.

1. *Of writ before deed recorded.*—The writ of attachment was levied at eleven o'clock, A. M., and the deed by defendant conveying the land to another, filed for record at two o'clock, P. M., of the same day. The levy being prior in point of time is stronger in right, and must prevail. *Clayburg v. Ford et al.*, 542

2. *On forfeiture of taxes.*—In a suit to recover the amount of tax due upon forfeited property, plaintiff must show that process of sale, as required by statute, had been issued. *Smith v. The People*, 380; *Fetter v. The People*, 385

SERVICE OF.

3. *On corporation.*—The statute provides that service may be made upon a corporation by leaving a copy of the summons with the president, secretary, etc., if either can be found in the county; if not, then by leaving a copy with any director, clerk, etc. These constitute two classes, and service upon one class is primary to service upon the other. Before service upon persons of the second class will confer jurisdiction upon the court, it must appear affirmatively that service could not be had upon persons in the first class, the return should show that the president of

PROCESS.

SERVICE OF. *Continued.*

the company did not reside in or was absent from the county. *St. L. V. & T. H. R.R. Co. v. Dawson*, 118

4. *Return, how made.*—Service of a summons upon a foreign insurance company, which states that the president of the company was not found in the city of Aurora, but fails to state that he was not found in the county where suit was brought, is insufficient. *Mich. State Ins. Co. v. Abens*, 488

5. *When company has ceased doing business.*—Where a foreign insurance company has ceased doing business in this State, service should be made upon the last designated agent of such company acting in the State. *Mich. State Ins. Co. v. Abens*, 488

WRIT.

6. *Misnomer.*—A writ of attachment sued out in the firm name, where the declaration in the cause gives the full names of the members of the firm, and there is an appearance by the defendant, is not such an irregularity as will render the writ void, or be grounds for a reversal. *Clayburg & Co v. Ford et al.*, 542

WRIT OF ASSISTANCE.

7. *How issued.*—Where a writ of assistance becomes necessary to put the complainant in possession of land to which he is entitled, he should present the facts requiring such writ to the court, so that the court may judge of the propriety of issuing it. *Smith v. Brittenham*, 62

PROMISE.—See AGREEMENT—NEW PROMISE.

PROMISSORY NOTE.

BONA FIDE PURCHASER.

1. *Note of third party.*—A creditor who receives from his debtor the bill or note of a third party, either in payment or as collateral security for his debt, is entitled to the same protection as a *bona fide* holder for value, and he takes it free from all equities which might have been urged between the original parties. *First Nat. Bank of Olney v. Beaird*, 239

CONSIDERATION.

2. *Gift.*—A note executed and delivered as a gift, is without a valuable consideration, and will not support an action either at law or in equity. *Arnold et al. v. Franklin*, 141

DAYS OF GRACE.

3. *When allowed.*—Promissory notes, other than such as are payable at sight, or on demand or presentment, are entitled to days of grace, and suit cannot be brought thereon until after the expiration of such days of grace. *Collins v. Montemy*, 182

DEFENSES.

4. *Against holder by delivery.*—Where suit is brought upon a note payable to A or bearer, by a person not the payee, and who became the owner thereof without its having been assigned, the maker can present his defense to the same extent that he could if suit was brought by the payee. *Rabberman v. Muehlhausen*, 326

5. *Breach of contract.*—The fact that a vendor in a contract for the

PROMISSORY NOTE.

DEFENSES. *Continued.*

sale of lands brings suit and obtains possession of the lands, the agreement not providing for possession by the vendee, is no defense to a suit brought on notes given for the purchase money. *Babcock et al. v. Hamende*, 426

6. *Evidence*.—Appellants being sued upon a promissory note. pleaded, that in consideration of procuring appellee a certain situation, he agreed to receive in satisfaction of the note shares of stock in the Enameling Co., and some lots then held by the Improvement Association; that the situation was procured and the stock and deeds of the lots tendered to appellee. Upon the trial appellants offered to show a chain of title from the government to the Association of the lots tendered, which was excluded. *Held*, that under the issues made it became material for appellants to show a good title to the land, and the evidence should have been admitted. *Mosher et al. v. Rogers*, 577

GENERALLY.

7. *Account—Statute of Limitations*.—Where suit was brought upon notes within sixteen years, the limitation of the notes, and it appeared that more than five years had elapsed after the cause of action upon the open account, which was sought to be applied on the notes as payment, had accrued, it was held that the Statute of Limitations operated against the account, and in the absence of any agreement to that effect, the account would not be considered as paid by application on the notes. *Stanwood v. Smith*, 617

8. *Given for entrance fee to race*.—A note given for the entrance fee to a race to be run for a purse, is not void under the statute as being a gaming contract. *Wilson et al. v. Conlin*, 517

INDORSEMENT.

9. *Evidence of previous contract*.—Where a contract of guaranty is written over a blank indorsement by the holder of the note, and a declaration upon such guaranty, there should be some evidence of a previous oral contract of guaranty before the written contract, denied under oath, should be permitted to go to the jury. *Windheim v. Ohlendorf*, 436

10. *Liability of indorser—Diligence*.—To charge an indorser, it must be shown that there has been due diligence by suit to collect the amount of the maker of the note, or that suit would have been unavailing, and as to the last, hearsay evidence that the land occupied by the maker was mortgaged, is not competent. *Windheim v. Ohlendorf*, 436

11. *Writing guaranty over*.—The holder of a promissory note has no authority to write a contract of guaranty over the name of an indorser, unless such act is in accordance with a previous existing contract of guaranty. *Windheim v. Ohlendorf*, 436

INNOCENT PURCHASER.

12. *Fraud or failure in the consideration*.—The defense of fraud or failure in the consideration of a note cannot be set up, where the note has been assigned before maturity for value, without tracing such defects to the knowledge of the assignee. *Taylor v. Thompson*, 109

PROMISSORY NOTE. *Continued.*

PAYMENT.

13. *Before assignment.*—In a suit upon a promissory note, the defendant offered to show payments made to the payee before assignment. Upon this point the court instructed jury, "that unless the defendant has shown in this case that he made any payments to the plaintiffs in this suit the jury will find for the plaintiffs the amount proven to be due on the note." *Held*, that one of the questions before the jury being whether payments had been made to the payee, of which the assignees had notice, the instruction was erroneous. *Knebelcamp v. Smith et al.*, 243

14. *Diligence of party.*—If a party would be secure in paying negotiable paper to a payee or assignee, before or after maturity, he must see to it that he pays to a holder of the note, and not to one who has been but is not when payment is made. He should ask to see the notes before he pays them and then take them up when paid. *McClelland v. Bartlett et al.*, 481

TRANSFER.

15. *By delivery.*—A promissory note payable to A or bearer cannot be transferred by mere delivery so as to vest the legal title in the holder or bearer. *Kabberman v. Muehlhausen*, 326

PROXIMATE AND REMOTE CAUSE.—See INJURIES.

RAILROADS.—See NEGLIGENCE.

BONDS IN AID OF.

1. *Conditions of subscription.*—Where the conditions upon which a town was authorized to subscribe for stock in a railroad, were that such road should be built through the township, within one-half mile of the court house, and should terminate at or near the city of V., the building of a road across one corner of such township and terminating at a small village nine miles from V., is not a substantial compliance with the conditions of the vote, and bonds issued in pursuance of such vote are invalid, and no tax can be collected to pay interest thereon, though they may be in the hands of innocent holders. *Parker et al. v. Smith et al.*, 356

2. *Imposed by town.*—The statute of 1869 giving to towns the right to prescribe conditions upon which subscriptions should be made or bonds issued, and declaring that such subscriptions or bonds should not be valid until the conditions shall have been complied with, applies to the bonds under all circumstances, in whosoever hands they may be. *Parker et al. v. Smith et al.*, 356

3. *Recitals in—Character of estoppel by.*—A bond reciting that it is issued by virtue of an act to incorporate the P. & D. R. Co., and in accordance with the vote of the electors of said town, although it may preclude an inquiry as to whether an election was held and a vote authorizing the bonds to issue, yet it could not conclude an inquiry into the performance of a condition that was to be performed after the bonds were issued. *Parker et al. v. Smith et al.*, 356

RAILROADS. *Continued.*

GENERALLY.

4. *Removal of obstructions.*—Where a railroad company has provided a safe and convenient way of approach to the depot, it is the duty of persons to seek that path rather than one appropriated by the company to its own use. A truck standing on a path appropriated by the company for its own use is not an obstruction which it is bound to remove. *Ill. Cent. R. R. Co. v. Brookshire*, 225

KILLING STOCK.

5. *Cattle-guards.*—The stock got upon the track by jumping the cattle-guard from the highway; but it appearing that the railroad company had performed its duty in making the cattle-guard as required by law, and that it was sufficient to turn ordinary cattle, the company were not liable for the injury, unless it was caused carelessly or willfully. *C. B. & Q. R. R. Co. v. Farrelly*, 60

6. *Fences—Condition at other places.*—The bad condition of the railroad fences at places other than where the stock got upon the track, cannot be shown in an action against the company for killing stock. *C. B. & Q. R. R. Co. v. Farrelly*, 60

SUBSCRIPTION.

7. *Curative act.*—The election being void, a subsequent act of the legislature legalizing the former vote is of no effect. It had no power to enact a law rendering a void election and subscription for corporate purposes valid. *County of Richland et al. v. The People ex rel.*, 210

8. *Election called by wrong authority.*—Where the act authorizing a municipal corporation to make subscriptions in aid of a railroad, provides that the election to vote upon the question shall be called by the county court, an election called by the board of supervisors is void, and confers no authority to make such subscription. The so-called vote is an idle form, and persons opposed to the subscription are under no obligation to vote against it, because they have the right to regard the entire proceeding as a nullity. *County of Richland et al. v. The People ex rel.*, 210

9. *Effect of change in organization.*—The fact that upon the adoption of township organization, the law requires that acts formerly done by the county court shall be performed by the board of supervisors, cannot affect the case, because the enabling act was passed subsequent to the adoption of township organization, and it will be presumed that the legislature had knowledge of that fact, and intended to confer the power upon the county court. *County of Richland et al. v. The People ex rel.*, 210

10. *Revocation of power by the constitution.*—After the curative act the board of supervisors made no further orders in regard to the subscription until after the present constitution went into effect. There was then no binding contract of subscription, and the subscription already made not being valid, it was then too late. The power was revoked by the constitution. *County of Richland et al. v. The People ex rel.*, 210

RATIFICATION.

OF TRESPASS.

1. *By receipt of proceeds.*—Where an attorney instructs a constable

RATIFICATION.

OF TRESPASS. *Continued.*

as to the manner of making a levy, and receives the proceeds of the sale thereunder, he thereby ratifies the acts of the constable in making the levy, so as to make him a trespasser *ab initio*. *Ferriman v. Fields et al.*, 252

RECITALS.—See MUNICIPAL BONDS.

RECORD.

MISTAKE IN.

1. *How corrected*.—A mistake in the record of a court may be corrected by the parties to the record, on motion in the court where it occurred, and by one who was not a party to the record, by a proceeding in chancery. *Edwards v. Sams et al.*, 168

RECOUPMENT.

DAMAGES.

1. *Actual*.—Only actual damages can be allowed in recoupment, and these must be proved. *Meyer et al. v. Stookey*, 336

GENERALLY.

2. *By surety*.—A surety may recoup for any damages arising out of the same subject matter, to the same extent as the principal might if he were sued alone. *Meyer et al. v. Stookey*, 336

REDEMPTION.—See MORTGAGE.

RELEASE.

OF SUBSCRIPTION TO STOCK.

1. *Releases all*.—A release of all or a portion of the amount subscribed by some of the stockholders of a corporation, releases all who do not assent to such release, or in some way give their sanction to it. *Rutz v. Esler & Ropiequet Co.*, 83

REPLEVIN.

BOND.

1. *Damages on breach of*.—Although the fact that an article returned as replevied was never actually taken into custody because attached to the realty and mortgaged, may constitute no sufficient defense to a suit on the replevin bond, yet upon the question of damages this may be shown, and in such case the measure of damages would be the amount of the loss sustained by the execution creditor by reason of the failure of the defendant to deliver the property at the time required, not what it would have been worth if unaffected by infirmity or prior liens, but its value subject to any defects or incumbrances that existed at the time it was replevied. *Jackson v. Bry*, 586

DEFENSES.

2. *Property in custody of court*.—A plea that the property replevied was held by the United States Marshal by virtue of a writ of execution, issuing out of the Circuit Court of the United States, presents a complete defense as to the jurisdiction of the State court over the subject matter in the replevin suit. *Hannebutt v. Cunningham*, 353

REPLEVIN. *Continued.*

PROPERTY IN DEFENDANT.

3. *Plea of.*—Under a plea of property in defendant, he may show by what means he came into possession of the property, and his title thereto. *McFarlan v. McClellan*, 295

4. *Burden of proof.*—Where the defendant pleads property in himself, the burden of proof is upon the plaintiff to show his title or right to possession. *McFarlan v. McClellan*, 295

RETURN OF PROPERTY.

5. *On dismissal of suit.*—It is error to award a return of the property replevied on dismissal of the replevin suit, where it appears the plaintiff never obtained possession of the property under the writ. *Prentiss v. Moore*, 539; *Paxton v. Schick*, 542

6. *Subsequent surrender of property.*—A subsequent surrender of the property to the defendant by the constable, under a claim of exemption, does not affect the rights of the surety on the replevin bond. His obligation was satisfied when the property was properly returned. *Richards et al. v. Rape*, 24

7. *To whom returned.*—Where a replevin bond was executed to a constable holding the property by virtue of an attachment writ, and upon the failure of the plaintiff to prove his right to the property, it was returned to another constable holding an execution against the property, issued in the attachment suit, which had in the meantime ripened into a judgment, the property was properly returned, and there was no breach of the bond. *Richards et al. v. Rape*, 24

8. *When will be awarded.*—To a declaration in replevin, the defendant pleaded *non cepit, non detinet*, property in another, that the property was held under certain writs of attachment and execution. Plaintiff filed a demurrer to the third, fourth and fifth pleas, which was overruled, and electing to stand by his demurrer, judgment was rendered against him for costs. Held, that under the state of the pleadings it was the duty of the court to render final judgment against the plaintiff, and for a return of the property. *Kimball v. Citizen's Savings Bank*, 320

RES ADJUDICATA.—See FORMER JUDGMENT.

WHEN MAY BE SHOWN.

1. *Need not be specially pleaded.*—When the plaintiff, under his general replication to defendant's plea of set-off, alleged that the wood desired to be set off was partnership wood, it was competent for the defendant to show under the pleadings as they stood, that the question of partnership had been decided adversely to the plaintiff in a former suit between them. *Bennett v. Pulliam*, 185

RESCISSION.

OF SALE.

1. *When to be made.*—Rescission of a contract of sale of a machine must be made within a reasonable time after the defects are discovered. *Morgan & Co v. Thetford*, 323

RESPONDEAT SUPERIOR.—See CITIES AND VILLAGES.

REVENUE.

ASSESSMENT.

1. *On capital stock.*—The case of *Pacific Hotel Co. v. Lieb et al.* 83 Ill. 602, followed. *Elgin City Banking Co. v. Eaton*, 432

TAXES.

2. *Agreement to pay taxes of another.*—On grounds of public policy no arrangement can be made between the collector and property-owner whereby the owner, or the property, can be discharged from liability by merely marking the taxes paid on the tax books. *Reutchler v. Huckle*, 144

3. *For road purposes.*—The tax for road and bridge purposes levied and collected within the corporate limits of a village, under the second clause of section 81, of the road law of 1877, should be paid over to the treasurer of such village. *City of Clinton v. Town of Clintonia*, 36; *The People v. Wilson*, 368

4. *Recovery on forfeitures.*—In order to support a personal action for the recovery of forfeited tax, there must first be a forfeiture, and all the steps necessary to produce a forfeiture must have been taken. There must have been a process of sale, an offer, and a failure to sell for want of bidders, and the absence of one of these essential requisites renders the forfeiture invalid, and all proceedings based thereon void. *Smith v. The People*, 380

2. *Restraining collection.*—Where it is sought to enjoin the collection of a tax on the ground that a part is unauthorized, it should be shown by the bill as nearly as possible what part is just and what part is unauthorized, and that which is just should be paid as a condition of obtaining the relief sought. *Wilson v. Weber*, 125

6. *Suit for forfeiture—Constitutional law.*—The statute providing that suit may be brought against the owner for the amount of tax due on forfeited property, is not in conflict with the provisions of the Constitution. *Smith v. The People*, 380

7. *Tax upon forfeited property.*—To warrant a recovery for the amount of tax due upon forfeited property, the plaintiff must show that there had been a notice, a judgment, a process issued for the sale of the property, an offer, and a failure to sell for want of bidders. Without proof that process was issued, there can be no sale or offer to sell the property, that would bind anybody. *Vetter v. The People*, 385

RIGHT OF WAY.—See ARBITRATION AND AWARD.

ROADS AND BRIDGES.

BRIDGES.

1. *Between adjoining towns.*—To give a right under the statute to one town to build a bridge at the joint expense of both, a prior contract between the commissioners of highways for the joint building of such bridge, is an essential pre-requisite. *Com'rs of Highway v. Wrought Iron Bridge Co.*, 570

2. *Contract not signed by majority.*—In this case the contract was

ROADS AND BRIDGES.

BRIDGES. *Continued.*

signed by only one member of the board of commissioners of one of the towns, and therefore such town is not bound by the contract. Nor does the fact that another commissioner of such town, after the completion of the work, signed the contract, create a liability against the town, where none existed before. Commissioners of highways cannot bind their town by individual acts; they can only act as an official body, and when met for the transaction of public business. *Com'rs of Highways v. Wrought Iron Bridge Co.*, 570

3. *Contract—How executed.*—The contract for the building of such a bridge should be executed by a majority of the commissioners of each town, acting as a separate body. Each town must be bound by the official action of its own Board of Commissioners. *Com'rs of Highways v. Wrought Iron Bridge Co.*, 570

HIGHWAYS.

4. *By prescription.*—The mere fact that people may have traveled over the way in question, and that it may have been denominated a public highway, does not make it such, even though such travel may have been permitted without objection for twenty years. *Harper et al. v. Town of Dodds*, 331

5. *Dedication—Not inferred from use.*—No inference or conclusion will be drawn against the owner of unenclosed land which is traveled, to establish an easement in the public. The voluntary use of a way by the public, with the assent of the owner, is not of itself sufficient to make it a public highway, but such use and assent, in connection with proof of actual recognition and repair by the public authorities, may warrant a jury in finding that the way is a public highway. *Harper et al. v. Town of Dodds*, 331

ROAD TAX.

6. *Collected within village.*—The tax for road and bridge purposes, levied and collected within the corporate limits of a village under the provisions of the second clause of section 81, of the road law of 1877, should be paid over to the treasurer of the village. *City of Clinton v. Town of Clintonia*, 36; *The People v. Wilson*, 368

TRESPASS.

7. *Right of town.*—A town has no such possessory right in a highway as that it may maintain trespass *quare clausum fregit*. *St. L. V. & T. H. R. R. Co. v. Town of Summit*, 155

RULES OF COURT.—See COURTS.

SCHOOLS.

SUITS.

1. *Costs against officers.*—Courts are forbidden by statute to charge costs where any agent of any school fund suing for the recovery of the same is plaintiff, and shall be unsuccessful in such suit. *Trustees of Schools v. Stokes et al.*, 267

2. *Testimony as to funds.*—In a suit against a township treasurer for

SCHOOLS.

SUITS. *Continued.*

failure to pay over money in his hands to his successor, evidence is admissible tending to show that funds of the district went into his hands as treasurer, and that he refused to pay over the same on demand, but converted them to his own use. *Trustees of Schools v. Stokes et al.*, 267

TEACHERS.

3. *Payment—Directors drawing orders.*—The school law provides that until a schedule is filed with the township treasurer, properly certified by the school directors, it shall not be lawful for such treasurer to pay any teacher, or any two members of the board of directors to draw an order in favor of such teacher. An order drawn by the board of directors upon the filing of a schedule is illegal and void, in whose hands it may be, and no recovery can be had thereon against the district. *School Directors v. First Nat. Bank of Greenville*, 349

TOWNSHIP TREASURER.

4. *Payment of money to successor.*—When a township treasurer goes out of office, it is his duty to pay over all moneys in his hands to his successor, and on failure to do so, an action will lie upon his official bond therefor at the suit of the trustees of schools, whether an apportionment of such moneys has been made among the several districts or not. If an apportionment has been made, it is not necessary that the board of trustees should sue for the use of the several districts. *Trustees of Schools v. Stokes et al.*, 267

SCIRE FACIAS.

TO REVIVE A JUDGMENT.

1. *Meaning of.*—*Scire facias* to revive a judgment is an action within the meaning of the Statute of Limitations requiring all actions to be commenced within sixteen years. *Gibbons v. Goodrich*, 590

SEPARATE MAINTENANCE.—See HUSBAND AND WIFE.

SEQUESTRATION OF LANDS.—See WILLS.

SET-OFF.

GENERALLY.

1. *Against an agent.*—Where one deals with an agent, knowing the agency, he cannot set off a claim due him from the agent against a debt due the principal. *Reutchler v. Huckle*, 144

2. *Against a note.*—Appellee sued appellant on a note for \$850. Appellant pleaded *inter alia* that the husband of appellee being indebted to appellant, procured an insurance on his life and delivered the policy to appellant to secure payment of the debt; that appellee, desiring to secure the insurance, agreed with appellant to pay him such sums as would be found due from her late husband on a settlement of their partnership matters, in consideration that he would assign said policy to her, which was done, the money collected by her, and \$850 left with appellant, for which the note in suit was given. Held, that the agreement constituted an original contract between appellant and appellee, and that appellant should have been allowed to set off the amount due from the deceased husband against the note. *Boischenius v. Irgens*, 599

SET-OFF. Continued.**MUTUALITY.**

3. *Must be between the same parties.*—V. & Co. executed a written agreement to S. for the payment of money, which was afterwards assigned to H. After executing the agreement, V. & Co. sued S. and her husband on an account due from S., and obtained judgment. In an action by the assignee of the agreement against V. & Co., held that the judgment against S. and her husband could not be set off. *Harpstrite v. Vasel*, 121

NATURE OF.

4. *Evidence of partnership.*—A plea of set-off is in the nature of a cross-action, and under a general replication to such plea, evidence may be given that the subject-matter of the set-off is a partnership asset between plaintiff and defendant. *Bennett v. Pulliam*, 185

5. *Money paid at request of plaintiff.*—Defendant claimed a set-off against plaintiff's claim on account of taxes paid by him at the request of plaintiff, but it not appearing that the taxes had been paid, or that defendant had become legally liable to pay them, the set-off should not have been allowed. *Reutcher v. Huckle*, 144

SIDEWALKS.—See **CITIES AND VILLAGES.****SLANDER.****ACTIONABLE WORDS.**

1. *Words actionable per se.*—The words "You are a God damned liar and a thief, and I can prove it," are actionable in themselves. *McGregor v. Eakin*, 340

2. *Proof.*—An instruction that strict proof of the words charged as slanderous is required, is incorrect; the rule is that they shall be substantially proven. *McGregor v. Eakin*, 340

JUSTIFICATION.

3. *Evidence.*—The evidence under the plea of justification in this case being very contradictory, the court does not find the verdict so far against the weight of evidence as to warrant a reversal. *Ware v. Pilgrim*, 474

4. *Evidence in mitigation of damages.*—If it appears that the defendant, although he cannot fully justify, had reason to believe from the plaintiff's own conduct that the charges were true, then such fact should be considered in mitigation of damages. *Moore v. Mauk*, 114

OF TITLE.

5. *May be sustained.*—An action of slander of title may be sustained where the slander is false and malicious, and where special damage results from speaking the slanderous words, such as preventing the sale or leasing of the land. *Van Tuyl v. Riner*, 556

6. *Punitive damages.*—In actions of this nature there may be evidence of such a wanton, willful and malicious attempt to injure the owner of the land, as will justify the finding of exemplary damages. *Van Tuyl v. Riner*, 556

SPECIFIC PERFORMANCE —See **CHANCERY—CONTRACTS.**

STATUTES.

CONSTRUCTION.

1. *Rule.*—Where in a statute a general intention is expressed, and the act also expresses a particular intention, incompatible with the general intention, the particular intention is to be considered in the nature of an exception. *Dunaway v. Goodall et al*, 197

STATUTE OF LIMITATIONS.

CONSTRUCTION.

1. *What statute applies.*—The statute in force at the time a cause of action accrues governs. *Gibbons v. Goodrich*, 590

PLEA OF.

2. *Sufficiency.*—A plea of the statute to an action on an unwritten contract is sufficient if it alleges a lapse of ten years instead of five. The greater includes the lesser. *Adams Ex. Co. v. King*, 316

SUBSCRIPTION.—See RAILROADS.

SURETY.

ESTOPPEL.

1. *By subsequent agreement.*—Where the sureties joined with their principal in an agreement to pay certain judgments rendered on the notes which they had signed, they are estopped to deny the validity of such judgments on the ground that there was no sufficient warrant of attorney authorizing them to be entered. *Apperson v. Gogin et al.*, 48

GENERALLY.

2. *Right to recoup.*—A surety may recoup for any damages arising out of the same subject matter, to the same extent as the principal might if he were sued alone. *Meyer et al. v. Stookey*, 336

LIABILITY OF.

3. *Not extended by implication.*—The liability of a surety cannot be extended by implication beyond the express terms of his contract. *McIntyre et al. v. Trustees, etc.*, 77
4. *On official bonds.*—The undertaking of a surety upon the official bond of a township treasurer, is that the principal shall pay over to his successor all moneys in his hands as such treasurer during his term of office, and he is not liable for wrongful acts of the treasurer prior to the execution of the bond. *McIntyre et al. v. Trustees, etc.*, 77

TAXES.—See REVENUE.

TENDER.

WHEN NOT NECESSARY,

1. *Of deed.*—Where a bond was given for a deed and afterwards a deed was executed and delivered in *escrow*, which the grantee subsequently obtained by fraud and placed upon record, a tender of a deed according to the condition of the bond was not necessary, on a bill filed to set aside the deed fraudulently obtained and for a lien upon the premises. *Crane et al. v. Hutchinson et al.*, 30

TITLE.—SEE FORCIBLE ENTRY AND DETAINER.

TRESPASS.

DAMAGES.

1. *Measure of—Loss of profits.*—In actions of tort, where the amount of profits of which the injured party is deprived as a result of the trespass, can be shown with reasonable certainty, such profits, to that extent, constitute a safe measure of damages, and so far as they are plainly traceable, he should receive compensation for them; but such damages must be the necessary and natural consequence of the act. Profits which are merely probable and speculative cannot be recovered. *Ill. & St. L. R. R. & C. Co. v. Decker*, 1'5

2. *Aiding and assisting.*—All persons who order, direct, aid or assist in the commission of a trespass, are liable for all damages, though not benefited by the act.—*Ferriman v. Fields et al.*, 252

3. *Ratification.*—An attorney who instructs a constable as to the manner of making a levy, and afterwards with full knowledge of the premises, receives the proceeds of the sale under such levy, ratifies and adopts the acts of the constable, so as to make him a trespasser *ab initio*, even if he was not so in the first instance. *Ferriman v. Fields et al.*, 252

LEVY OF EXECUTION.

4. *Excessive—Receipt of proceeds.*—The levy upon the goods of a stranger is a trespass, and the plaintiff in execution becomes liable therefor by receiving the amount derived therefrom, which is an approval of the act, but the goods being in parcels, an excessive levy is a further and independent wrong, not necessarily or naturally growing out of the other. The mere receipt by the plaintiff in execution of the amount of his debt, without notice of the excessiveness of the levy, is not a ratification or approval of such excessiveness. *Buchanan v. Goeing et al.*, 635

5. *Liability of plaintiff.*—The plaintiff in an execution is responsible for the acts of the constable in making a levy thereunder, only so far as he aids, directs or authorizes them to be done, or approves of them afterwards as done in his name or interest; and if these acts were several, then only for such as he so aids, directs, authorizes or approves. *Buchanan v. Goeing et al.*, 635

TRESPASS QUARE CLAUSUM.—See ACTIONS.

TRIAL OF RIGHT OF PROPERTY.

APPEAL.

1. *Must be prayed for instant.*—In a trial of the right of property, an appeal must be prayed on the day of entering judgement in the cause. *Murphy v. McDonald*, 19

TOWNS.—See ROADS AND BRIDGES—MUNICIPAL BONDS.

TOWNSHIP TREASURER.—See SCHOOLS.

VACATION OF OFFICE.—See OFFICER.

VENDOR AND VENDEE.—See LIEN.

VERDICT.—See JURY.

AGAINST EVIDENCE.

1. *In actions ex delicto*.—If the finding of the jury is manifestly against the weight of evidence, the verdict will be set aside, even where there is some evidence in favor of the verdict; and in actions *ex delicto* courts will interfere with verdicts in order to prevent manifest injustice.

Moore v. Mauk, 114

2. *When will be set aside*.—While courts are reluctant to set aside the verdict of a jury, whose province it is to pass upon questions of fact, and will not do so where there is conflicting testimony, though the court may believe the preponderance of evidence to be against the verdict, yet it is the duty of the court to interpose and set aside a verdict when that verdict is not supported by the evidence. *City of East St Louis v. Klug*, 90

3. *Reversals*.—The court from an examination of the record, are of opinion the verdict is against the evidence, and reverse the judgment. *Carson v. City of Bloomington*, 38; *Smith v. Bingman*, 65

VOTE.

WHEN VOID.

1. *Election called by wrong authority*.—Where the act authorizing a municipal corporation to make subscriptions in aid of a railroad, provides that the election shall be called by the county court, and it is called by a wrong authority, as the board of supervisors, it is void, and confers no authority to make such subscription. The so-called vote is an idle form, and persons opposed to the subscription are under no obligation to vote against it, because they have the right to regard the entire proceeding as a nullity. *County of Richland et al. v. The People ex rel.*, 210

WAIVER.—See ARBITRATION AND AWARD.

WIDOW'S AWARD.—See ADMINISTRATION OF ESTATES.

WILLS.

CONSTRUCTION.

1. *Legacy—Upon what property charged*.—The first clause of a testator's will, after devising to his wife the use, during her life, of all his real estate, concluded as follows: "Also all my household and kitchen furniture, goods, chattels, moneys and effects, * * * but subject to the payment of the bequest to E, hereinafter named." Held, that this specific bequest was not a charge upon the real estate; but it appearing that the widow had come into possession of sufficient personal estate to make provision for its payment, and had elected to take under the will, it was not error to render a personal decree against her for the payment of the amount due on the bequest, and to enforce future compliance with the bequest, the court might order the widow's interest in the lands sequestrated. *Talbot et al. v. Rountree*, 275

2. *Residuary legatee*.—The testator's daughter was made residuary legatee, after the death of the widow, of all the lands and personalty.

WILLS.**CONSTRUCTION.** *Continued.*

Held, that although it was competent for the court to make the payment of the specific legacy a charge upon all the interest of the widow, yet the court erred in ordering a sequestration of the lands for a longer period than the life of the widow. By the terms of the will, the residuary legatee will become charged with the payment of this legacy, but until she comes into possession this liability will not attach. *Talbot et al. v. Rountree*, 275

WITNESSES.—See EVIDENCE.

WRIT.—See PROCESS.

WRIT OF ASSISTANCE.—See PROCESS.

WRIT OF ERROR.**WHEN WILL NOT LIE.**

1. *Must be from final order.*—A writ of error will not lie except to a final order of court. There must be a final disposition of the case as to all parties. A cause of action cannot be reviewed as to one party at one time and as to another party at another time. *The People v. McFarland*, 237

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